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Supreme Court of the United States

OCTOBER TERM, 1948

No. 14

INTERNATIONAL UNION, U. A. W. A., A. F. of L.,
LOCAL 232, ET AL., PETITIONERS,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD,
ET AL.

No. 15

INTERNATIONAL UNION, U. A. W. A., A. F. of L.,
LOCAL 232, ET AL., PETITIONERS,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD,
ET AL.

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE
OF WISCONSIN

PETITION FOR CERTIORARI FILED FEBRUARY 7, 1948.

CERTIORARI GRANTED MARCH 15, 1948.

SUPREME COURT OF THE UNITED STATES

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INDEX

	Original	Print
Proceedings in Supreme Court of Wisconsin	a	1
Caption	a	1
Appendix in Wisconsin Employment Relations Board vs. International Union, U. A. W. A., A. F. L., Local 232, et al.	b	1
Proceedings in Circuit Court of Milwaukee County	101	1
Decision	101	1
Petition of Board	118	12
Exhibit "A"—Decision, findings of fact, con- clusions of law and order of Board	122	14
Answer to petition	134	21
Stipulation for consolidation	136	23

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Appendix in Wisconsin Employment Relations Board vs.
International Union, U. A. W. A., A. F. L., Local 232,
et al.—Continued

Proceedings in Circuit Court of Milwaukee County—

Continued

	Original	Print
Judgment	137	23
Notice of appeal	140	25
Proceedings before Wisconsin Employment Re- lations Board	141	25
Complaint of Briggs & Stratton Corporation	141	25
Answer of Local 232	148	30
Transcript of hearing	151	32
Caption and appearances	151	32
Testimony of Raymond W. Griffith	154	33
Anthony Doria	173	44
Lucille A. Kanzora	183	50
Cyril Nicholas Nemmig	189	53
Mary Frankulin	193	56
Elizabeth Schultz	198	59
Elsie Wussow	200	60
Ralph Beyer	201	61
Harvey Klausner	202	62
Fred F. Zabel	205	64
Raymond W. Griffith (re- called)	208	65
Anthony Doria (recalled)	208	66
Raymond Kress	211	67
Arthur Koenig	212	68
Frank K. Slowik	214	69
Clifford Matchey	216	71
Erwin Fleischer	224	75
John H. Corbett	227	77
Clarence Ehrman	229	78
Herbert Jacobsen	231	79
Gene Schmidt	234	82
Anthony Doria (recalled)	235	82
Oliver L. Dostaler	237	83
Raymond Griffith (re- called)	239	85
Joseph Doyle	241	85
Recital as to Exhibits 1 to 5, inc.	241	86
Exhibit 6—Milwaukee Journal news ar- ticle by Samuel N. Sherman entitled “Work Time Meetings New Labor Weapon”	242	86
Recital as to Exhibits 7 to 13, inc.	246	89
Appendix in International Union, U. A. W. A., A. F. L., Local 232, et al. vs. Wisconsin Employment Relations Board, et al.	249	90
Proceedings in Circuit Court of Milwaukee County	251	90
Petition of Union for review	251	90
Notice of appearance of Board	257	94

Appendix in International Union, U. A. W. A., A. F. L.,
Local 232, et al. vs. Wisconsin Employment Relations
Board, et al.—Continued

Proceedings in Circuit Court of Milwaukee County—
Continued

	Original	Print
Notice of appearance and statement of position of Briggs & Stratton Corporation	258	95
Notice of appeal of Briggs & Stratton Corpora- tion	260	96
Notice of appeal of Wisconsin Employment Re- lations Board	260	96
Recital as to decision, judgment, proceedings be- fore Board and order of Board	261	96
Caption	273	97
Notice of appeal of Wisconsin Employment Relations Board, Case No. 146	274	98
Notice of appeal of Briggs & Stratton Corporation	275	98
Notice of appeal of Wisconsin Employment Relations Board, Case No. 147	276	99
Notice of request for review and reversal by appellees	277	101
Minute entries of argument and submission	278	102
Judgment, Case No. 146	280	104
Judgment, Case No. 147	281	105
Opinion, Fowler, J.	282	106
Dissenting opinion, Wickhem, J.	298	122
Motion for rehearing	302	126
Order retaining records	303	127
Order denying motion for rehearing	303	127
Clerk's certificate	304	128
Order extending time to file petition for writs of certiorari	305	129
Orders allowing certiorari	306	130

[fol. a] **IN SUPREME COURT OF WISCONSIN**

AUGUST TERM, 1946

Nos. 146 & 147

**INTERNATIONAL UNION, U. A. W. A., A. F. OF L., LOCAL 232;
Anthony Doria, Clifford Matchey, Walter Berger, Erwin
Fleischer, John H. Corbett, Oliver, Dostaler, Clarence
Ehrman, Herbert Jacobsen, Louis Lass, Respondents,**

v.

**WISCONSIN EMPLOYMENT RELATIONS BOARD; L. E. GOODING,
Henry Rule and J. E. Fitzgibbon, as Members of the
Wisconsin Employment Relations Board; and Briggs &
Stratton Corporation, a corporation, Appellants.**

WISCONSIN EMPLOYMENT RELATIONS BOARD, Appellant,

v.

**INTERNATIONAL UNION, U. A. W. A., A. F. OF L., LOCAL 232;
Anthony Doria, Clifford Matchey, Walter Berger, Erwin
Fleischer, John H. Corbett, Oliver Dostaler, Clarence
Ehrman, Herbert Jacobsen, Louis Lass, Respondents.**

[fol. b]

Appendix

in

WISCONSIN EMPLOYMENT RELATIONS BOARD

v.

**INTERNATIONAL UNION, U. A. W. A., A. F. L., LOCAL
232, et al.**

[fol. 101] **IN CIRCUIT COURT OF MILWAUKEE COUNTY**

DECISION (Omitting formal parts)

In the first of the above entitled actions, which were consolidated for the purpose of hearing, the Wisconsin Employment Relations Board, hereinafter called the Board, seeks to have an order issued by it on May 11, 1946, enforced, while in the second action the International Union, here-

after called the union, or Local 232, seeks a review of the same order under Section 111.07 (8) and Section 227.15.

I have considered all the arguments, contentions and authorities contained in the several briefs and memoranda filed, the last of which was submitted on August 10, 1946, but will confine this opinion only to such facts and authorities as support the conclusion reached.

The last bargaining contract between the employer and Local 232 expired July 1, 1944. At the time of the occurrence of the work stoppages referred to in the record, there was no existing collective bargaining agreement between the employer and the union. Although it was publicly announced that a new contract has been entered into since the submission of these actions to the court, the issue of the legality or illegality of the work stoppages remains for determination by the court.

At a meeting of Local 232 held on November 3, 1945, a new method of exerting economic pressure upon the employer was discussed by the membership, which authorized "the executive board to call a special meeting during working hours at any time they saw fit" (Exhibit 11).

The calling of such meetings during working hours resulted in work stoppages. No advance notice was given to the employer of such proposed stoppages.

From November 6, 1945, to March 22, 1946, some twenty-seven meetings were called (R. 9-11) (Exhibit 2), resulting in each case in work stoppages of a few hours each. In each case the employees returned to work at the usual time on the following day.

On February 15, 1946, the membership of the union, by a secret ballot, reaffirmed its authorization given the executive board to continue the calling of special meetings at any time. The vote in favor of the continuance of the calling of meetings was 1174, with 7 votes in opposition thereto.

The Board found upon the evidence submitted that there was no contract in existence between the union and the employer, and accordingly the union was not guilty of a contract violation, as charged by the employer (Finding 4), and found that acts of violence against persons declining to take part in work stoppages were not traceable to the union and the union members (Finding 10).

The Board ordered that the union, and the individually [fol. 103] named officers of the union, cease and desist from:

"(a) Engaging in any concerted efforts to interfere with production by arbitrarily calling union meetings and inducing work stoppages during regularly scheduled working hours; or engaging in any other concerted effort to interfere with production of the complainant except by leaving the premises in an orderly manner for the purpose of going on strike.

(b) Coercing or intimidating employees by threats of violence or other punishment to engage in any activities for the purpose of interfering with production or that will interfere with the legal rights of the employees."

In a memorandum accompanying its order, the Board explained its decision that such work stoppages are a new labor weapon, and cited the following cases as authority for its conclusion that such conduct and activities did not constitute a strike.

The first case cited by the Board in its memorandum is that of *Conn v. N. L. R. B.*, 108 Fedl. (2d) 390. That case involved a refusal of certain employees to work overtime hours. There was no collective bargaining agreement between the employer and employees requiring the employees to work such overtime hours, and because of the refusal of [fol. 104] the employees to work overtime they were dismissed by the employer.

The National Labor Relations Board held that the employer had committed an unfair labor practice by discriminating against the discharged employees because "of their membership in a labor organization and their concerted activities for the purposes of collective bargaining and other mutual aid or protection." On review, the Circuit Court of Appeals found that the refusal of the men to work the daily overtime was not a strike.

The facts in that case are clearly distinguishable from those in the instant situation. Here the employees were not seeking to determine for themselves what their hours of employment were. They were not insisting on the right to work on terms prescribed solely by them, but were insisting on the *right not to work*, in order to induce the employer to arrive at an agreement relating to the terms of their employment.

The second case cited, that of *N. Y. State Labor Relations Board v. Union Club*, 52 N. Y. Sup. (2d) 74, involved the discharge of two employes because of refusal to return to work. In that case the employes would stop at a signal from their steward and would leave their respective stations and go to their locker room, where they stayed for periods ranging from one-half hour to two hours. They, therefore, remained on the premises of the employer. Upon the occasion of the eighth such stoppage, the club manager directed the employes to return to their work, and all but the two obeyed, and these two were discharged.

The State Labor Board held that the discharge of the two employes who refused to work when ordered, after all the other employes who had engaged in the stoppage activities did return and therefore were not dismissed, *was a discriminatory discharge, and therefore had ordered the reinstatement of the employes with back pay.*

The reviewing court pointed out in its decision that:

"The State Board, by the nature of the relief it afforded, treated the discharges as discriminatory and not as if the two men were striking employes."

The reviewing court, however, held:

"That the master acted within its rights, in that the two discharged employes (McTeague and Jacobs) were guilty of acts of insubordination in refusing to obey a direction to return to work."

It will be observed that in this case the employes who refused to return to work when ordered to do so remained upon the premises of the employer. In the instant case there was neither a direction to return to work by the employer, nor did the employes remain upon the premises of the employer.

[fol. 106] The decision of the reviewing court in the aforesaid Union Club case was, however, reversed on May 29, 1946, by the N. Y. Court of Appeals, "on the ground that there is evidence sufficient to support the finding of the Labor Relations Board that the employers' dismissal of the employes McTeague and Jacobs was motivated by their concerted union activities." Thus the ultimate holding in the Union Club case is not decisive of the issues herein.

The main issue in this case is whether the new labor weapon of calling meetings of union members during work hours, and the resulting work stoppage to attend such meetings, is a lawful, concerted activity within the provisions of Chapter 111 of the Wisconsin statutes, which, among other things, provides as follows:

"Section 111.04. Employees shall have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection; such employees shall also have the right to refrain from any and all of such activities."

Section 111.06 (2) (a) provides:

"2. It shall be an unfair labor practice for an employee individually or in concert with others:

[fol. 107] (a) To coerce or intimidate an employee in the enjoyment of his legal rights, including those guaranteed in section 111.04, or to intimidate his family, picket his domicile, or injure the person or property of such employee or his family."

Section 111.06 (2) (h) provides:

"(h) To take unauthorized possession of property of the employer or to engage in any concerted effort to interfere with production except by leaving the premises in an orderly manner for the purpose of going on strike."

Thus it will be seen from the foregoing applicable statutes that the employees have a guaranteed legal right to "engage in lawful concerted activities for the purpose of collective bargaining, or other mutual aid or protection." Section 111.06 (2) (h) denominates an unfair labor practice "to take unauthorized possession of property of the employer or to engage in any concerted effort to interfere with production except by leaving the premises in an orderly manner for the purpose of going on strike."

It is admitted that the work stoppage does interfere with production, and the only question is whether the leaving of

the premises of the employer to attend union meetings, [fol 108] thereby creating a work stoppage, constitutes a strike within the exception of the statute (Sec. 111.06 (2) (h)).

"It is the settled general American rule, effected largely without the intervention of legislation, that workmen who are not bound by contract for a definite period, and have not been, by agreement, freely made, given such rights, may without liability, abandon their employment at any time, either singly or in a body, as a means of compelling or attempting to compel their employers to accede to demands for better terms and conditions." 31 Am. Jur. 928.

The aforesaid rule is supported by a large number of decisions from various jurisdictions, and cited in the notes under such rule.

Counsel for both the Board and the union cite the case of *Walter Oeflein, Inc., v. State*, 177 Wis. 394, in which our supreme court quoted with approval Webster's New International Dictionary, defining the work strike as follows: "An act of quitting when done by mutual understanding by a body of workmen as a means of enforcing compliance with demands made on their employer."

The court further stated that:

"Numerous other definitions of the term 'strike' appear in law dictionaries and decisions, all of which, however, substantially include the elements contained in the definition above set forth."

[fol. 109] Applying the aforesaid approved definition of a strike to the actions of the employees in their so-called work stoppages, we find that each and every element is present. There was (a) an act of quitting (b) which was done by mutual understanding (c) by a body of workmen (d) for the purpose of enforcing compliance with demands made on the employer.

Gauged by the presence of each of the aforesaid enumerated elements, each of the stoppages involve in the instant case was a strike.

The answer to the contention that before each walkout there was no formal demand made on the employer is the admitted fact that at and prior to the first walkout, and at

the time of the subsequent walkouts, the employer and the union were engaged in negotiating a new contract, which negotiations of necessity must have been the result of demands made upon the employer by the union.

In the case of *West Allis Foundry Co. v. State*, 186 Wis. 24, which involved a prosecution for false advertisement for labor without stating in such advertisement that a strike existed, the normal force of employes was about thirty-five, and of such number eight union members and two non-union members ceased working on October 22, 1923, because of notice given on October 8, 1923, to the entire force, of a proposed uniform cut of five cents per hour in their wages. [fol. 110] The court stated that:

"Under the undisputed facts in this case, the employes withdrawing on October 22, were lawfully exercising a right, by such concerted withdrawal, to lessen production, delay or impair the employer's work, increase the cost thereof, or cause material interference with his carrying on of contracts he may have had with others, in order to thereby redress their grievance. It is the concerted withdrawal, however, of such employes that makes the strike."

The court held that:

"At the time of the advertisement in February, 1924, the force or economic pressure that had been exerted on the employer by such withdrawals was no longer in existence."

Justice Crownhart, dissenting from the majority decision, held that the strike had not ended on the day that the advertisement appeared, because the usual concomitants of a strike still attached to the situation. (p. 39).

If lessened production, delay or impairment of the employer's work, increasing the cost thereof, or causing material interference with his carrying on of contracts which he may have had with others, and which are the direct consequence of a concerted withdrawal by the employes, are declared by our supreme court to be the result of a lawful [fol. 111] exercise of a right in the aforesaid case, then it follows that the concerted withdrawal by the employes in the instant case for a few hours on various days to attend union meetings, and which concerted withdrawal may pro-

duce the same or similar results, except perhaps in a lesser degree, cannot be deemed an unlawful exercise of the same right. It will be noted also that our supreme court in the aforesaid case declared that "it is the concerted withdrawal of employes that makes the strike."

In my research and study of authorities dealing with the subject of strikes, I have found no case, and none has been called to my attention, wherein the courts said that employes withdrawing from employment must refrain from returning to work until their demands are met or until a new agreement embodying all or some of their demands is reached. Nor can the conduct of the withdrawing employes in this case be deemed an interference with the management of the business of the employer, as in the case of controversies relating to the use by an employer of labor saving machinery, or of compelling the employer to continue a department he desires to abandon, or of compelling an employer to divide all work available among all of his employes instead of laying off part of them.

By concerted withdrawal from the place of employment periodically as disclosed by the record, the employes at [fol. 112] tempted to secure the attainment of a lawful object, to wit, a collective bargaining agreement which would contain an improvement in the terms and conditions of their employment.

"It is unquestioned that laborers have the right, through concerted action by means of a strike, to attempt to secure the attainment of any of the lawful objects for which they may combine. It is settled that workmen have the right to organize for the purpose of securing improvement in the terms and conditions of labor, and to quit work or to threaten to quit work as a means of compelling or attempting to compel employers to accede to their demands for better terms and conditions. Indeed, the reason for a strike may be based upon any one or more of the multifarious considerations which in good faith may be believed to tend toward the advancement of the employes." (Citing decisions from various jurisdictions.) 31 Am. Jur. 934.

It is contended that under the work stoppage plan involved herein it would be, practically speaking, impossible for the employer to hire any new employes to replace those

who declined to work, since their cessations were always of brief duration and without notice. It will be noted that the employer could hire others, even for a brief period of time, if he were able to do so.

The difficulties in exercising such right must be conceded, but such difficulties perhaps are no greater than in the case of a strike-bound plant where the pickets are exercising [fol. 113] their statutory right of persuading others not to take the place of striking employees. At any rate, the difficulties on the part of the employer in exercising or attempting to exercise his right cannot destroy the rights of employees guaranteed to them by the statute to engage in a strike.

Furthermore, it will be noted in this connection that:

"It has long been recognized by the law that the relationship existing between an employer and an employee is not necessarily terminated by a strike. By withdrawing temporarily from the service, the employees seek to induce the employer to acquiesce in their demands and to reinstate them in the service under the conditions that they seek to impose. Although they cease to work, the employees intend to retain their positions." 31 Am. Jur. 928, paragraph 191.

In the case of *Jeffery-De Witt Insulator Co. v. National Labor Relations Board*, 91 Fed. (2d) 134, at 137, wherein a writ of certiorari was denied, in 302 U. S. 731, 82 L. E. 565, the court quotes approvingly from *Michaelson v. U. S.*, 291 Fed. 940, 942, reversed in 266 U. S. 42, 69 L. E. 162, as follows:

"In the case of a controversy over wages and conditions of work in a private and local industry, we agree with counsel for plaintiffs in error that a "strike" does not of itself terminate the relation of employer and employee. A controversy arises, and the employees, then [fol. 114] at work, say to their employer: "We shall stop work until you are in what we may consider a more reasonable state of mind. We shall deprive you of our labor as a legitimate means of exerting economic pressure to induce you to yield. If we do go out, we shall remain at hand, ready to negotiate with you concerning fair wages and working " "rules, and ready to return to work the moment we can agree." *It is by reason of a*

'failure to agree, the employes stop their work, a "strike" is on. They are no longer working and receiving wages; but, in the absence of any action other than above indicated looking to a termination of the relationship, they are entitled to rank as "employes," with the adjective "striking" defining their immediate status.' "

If the temporary withdrawals or work stoppages are not strikes, then it is the province of the legislature to so declare by a definition of a strike. It is not within the powers of the court to legislate. Its duty is to determine the controversy by the application of recognized legal principles.

From what has been said heretofore, and upon the authorities hereinbefore cited, I have concluded that the periodic withdrawals of the employes for the purpose of attending union meetings, and which withdrawals resulted in work stoppage, actually constituted a strike, and therefore are not prohibited by the provisions of Section 111.06 (2) (h); that this conclusion is one of law drawn from the undisputed [fol. 115] facts in this case; that paragraph 1 (a) of the Board's cease and desist order is erroneous and must be vacated, and accordingly the Board's petition to enforce same must be and is hereby denied.

By paragraph 1 (b) of the Board's order, the union and its named officers are ordered to cease and desist from:

"Coercing or intimidating employes by threats of violence or other punishment to engage in any activities for the purpose of interfering with production or that will interfere with the legal rights of the employes."

The aforesaid portion of the order and the corresponding findings in relation thereto are challenged by the union and its named officers as not being supported by the evidence. The court's power and functions in these proceedings are limited by statute and the decisions of our supreme court. In *United Shoe Workers, etc. v. Wisconsin Labor Relations Board*, 227 Wis. 569, at 574-5, the rule has been stated as follows:

"... Certainly the court cannot go beyond the powers conferred upon it by statute. This is not a *certiorari* nor a *mandamus* proceeding, but a proceeding upon a petition for review under the act. The legislature has carefully limited the field within which the court may

proceed: First, by making the findings of the Board conclusive upon the court if supported by evidence; and, [fol. 116] second, by confining it 'to a review of an order.' What is meant by 'review of an order' of an administrative agency is clearly understood in the law. The court must examine the record to discover whether or not the findings of fact are supported by any evidence if the findings are challenged. If the findings of fact are so supported or not challenged, it next inquires whether or not the facts found support the conclusions of the board; and, third, whether the Board acted within the scope of its statutory powers in making the order or within its jurisdiction as it is often said."

In the case of *Retail Clerks Union v. Wisconsin Employment Relations Board*, 242 Wis. 21, at p. 31, the court said.

"The findings of fact made by the board, if supported by credible and competent evidence, are conclusive. Sec. 111.07 (7), Stats. The extent of the review by the courts is the same as that under the Workmen's Compensation Act, that is, *there must be some evidence tending to support the findings of the Board, and, if this is discovered, the court may not weigh the evidence to ascertain whether it preponderates in favor of the finding.* *Wisconsin Labor Relations Board v. Fred Rueping L. Co.*, 228 Wis. 473, 493, 494, 279 N. W. 673. The drawing of inferences from the facts is a function of the board and not of the courts. *National Labor Board v. Linkbelt Co.*, 311 U. S. 584, 597, 61 Sup. Ct. 358, 85 L. E. 368; *Wisconsin Labor Relations Board v. Fred Rueping L. Co.*, *supra*."

[fol. 117] With the aforesaid rules in mind, I have examined the entire record to ascertain if there is some evidence tending to support the findings of the Board and the challenged portion of the order. It is my considered judgment from a study of the record that there is some evidence tending to support the findings of fact and conclusions of law upon which the challenged portion of the order rests. The material testimony tending to support the challenged finding of fact and conclusion of law of the Board is found on the following pages of the record: 54-59, 64-66, 68-69, 72-78, 82-85, 90-95, 98-101, 114-115, 118-119, 133.

The evidence referred to and found on the aforesaid pages of the record, quotation of which would serve no useful purpose, is sufficient to support the finding and conclusion that some of the employes were coerced or intimidated by threats of violence and damage inflicted upon their person, clothing and other property, to engage in the walk-out or stoppage activities, and such intimidation interfered with the legal and statutory rights of the employes to refrain from engaging in such activities, as guaranteed by Sec. 111.04.

It follows that the Board's petition to enforce paragraph 1 (b) of the order must be and is hereby granted, and the union's and its named officers' petition to review and vacate same must be and is hereby denied.

[fol. 118] Under the rule enunciated in *Christoffel v. Wisconsin Employment Relations Board*, 243 Wis. 332, it is solely a function of the Board, and not of the court, to determine what remedy shall be prescribed for the purpose of preventing unfair labor practices. The requirement of posting notices of the provisions of the Board's order, and notification of the Board of the steps taken to comply with the order, has been approved by our supreme court in several cases. *Allen-Bradley Local 1111 v. Wisconsin E. R. Board*, (1941) 237 Wis. 164; *Christoffel v. Wisconsin E. R. Board*, (1943), 243 Wis. 332; *Retail Clerks' Union v. Wisconsin E. R. Board*, (1942), 242 Wis. 21; *Public S. E. Union v. Wisconsin E. R. Board*, (1944), 246 Wis. 190.

Counsel for the Board will prepare and present orders in accordance with the aforesaid conclusions.

October 18, 1946.

(S.) John C. Kleczka, Circuit Judge.

Summons (not printed)

IN CIRCUIT COURT OF MILWAUKEE COUNTY

PETITION OF WISCONSIN EMPLOYMENT RELATIONS BOARD
(OMITTING FORMAL PARTS)

Now comes the Wisconsin Employment Relations Board, plaintiff and petitioner in the above entitled matter, by [fol. 119] John E. Martin, Attorney General, Stewart G. Honeck, Deputy Attorney General and Beatrice Lampert,

Assistant Attorney General, and for cause of action alleges and shows to the court:

1. That the Wisconsin Employment Relations Board, hereinafter referred to as the board, is and at all times mentioned herein was an administrative body created by Chapter 57, Laws of 1939, and that L. E. Gooding is the chairman and J. E. Fitzgibbon and Henry C. Ryle are commissioners or members of said board.

2. That the respondent, International Union, U. A. W. A., A. F. of L., Local 232, hereinafter referred to as the union, is an unincorporated voluntary labor organization which has its office and usually transacts business in the City of Milwaukee, Milwaukee County, Wisconsin.

3. That the other respondents above named are officers of and constitute the bargaining committee of said union who reside in the City of Milwaukee, Milwaukee County, Wis.

4. That Briggs & Stratton Corporation, hereinafter referred to as the employer, is a Delaware corporation, authorized to engage in business in the State of Wisconsin, having its principal place of business in said state in the City of Milwaukee, Milwaukee County, Wisconsin, and that said corporation engages the services of employees for hire in the State of Wisconsin.

[fol. 120] 5. That on or about the 25th day of February, 1946, the employer filed a complaint with the board charging the above named respondents with having engaged in unfair labor practices within the meaning of sec. 111.06, Wisconsin Statutes, as more fully appears by the record of the proceedings of the board filed herein in the circuit court for Milwaukee County.

6. That after due notice and hearing upon said complaint the board did, on the 11th day of May, 1946, make and file its decision, findings of fact, conclusions of law and order with reference to said charges of unfair labor practices, a true and correct copy of which is hereto attached, marked Exhibit A and made a part hereof.

7. That copies of the said decision, findings of fact, conclusions of law and order of the board, Exhibit A, were duly served upon the respondents above named and upon the

employer; that said order, since its issuance, has been in full force and effect; that the above named respondents and each of them have not, within the time required in said order notified the board in writing what steps they have taken to comply with the same. That the board is informed and believes that the said respondents and each of them have failed and neglected to take any steps to comply with the terms of said order and alleges that said respondents and none of them have complied with either the cease and desist provisions of said order nor the affirmative action requirements and provisions thereof.

8. That the said board has caused to be certified and filed in this court its record in the proceedings entitled "Briggs & Stratton Corporation, a Corporation, Complainant, v. International Union, U. A. W. A., A. F. L., Local 232, Anthony Doria, Clifford Matchey, Walter Berger, Erwin Fleischer, John H. Corbett, Oliver Dostaler, Clarence Ehrman, Herbert Jacobsen, Louis Lass, Respondents, Case III, No. 1173 Cw-64, Decision No. 953" including all documents and papers on file in the matter, the pleadings and testimony upon which the order therein was entered, and the findings and order of the board, to which record reference is hereby made and the same is incorporated herein as if specifically set forth.

Wherefore the board prays that the court enter a judgment and decree confirming and enforcing all of the provisions of the order herein referred to (Exhibit A) and for such other relief as the facts and circumstances may warrant.

Dated at Madison, Wisconsin, this 8th day of June, 1946.

[fol. 122] EXHIBIT A (ATTACHED TO PETITION OF WISCONSIN EMPLOYMENT RELATIONS Bd.)

Findings of Fact, Conclusions of Law, Order and Memorandum Decision of the Wisconsin Employment Relations Board (Omitting formal parts)

The above entitled matter having come on for hearing; the Board having heard the testimony and arguments of counsel; and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

Findings of Fact

1. That the complainant is a Delaware Corporation authorized to engage in business in the State of Wisconsin, having its principal place of business in the State of Wisconsin at 2711 North 13th Street, in the city and county of Milwaukee. That it operates two manufacturing plants in said city and county, at which plants it employs approximately 2,000 production and maintenance employes in the manufacture of various products.

2. That the respondent, International Union, UAWA-AFL, Local No. 232, is an unincorporated voluntary labor organization having its office at 2709 North 12th Street in [fol. 123] the city of Milwaukee, Wisconsin, and has been designated by the production and maintenance employes of the complainant at their Milwaukee factories as the exclusive bargaining agent for such employes for the purpose of representing them in negotiations with the complainant with respect to rates of pay, conditions of employment and hours of employment.

3. That Walter Berger, John H. Corbett, Anthony Doria, Oliver Dostaler, Clarence Ehrman, Erwin Fleischer, Herbert Jacobsen, Louis W. Lass and Clifford L. Matchey, are officers of and constitute the Bargaining Committee of said respondent union, and, with the exception of Anthony Doria and Clifford Matchey, are all employes of the complainant.

4. That for several years the complainant and respondent union have entered into various collective bargaining agreements, the last written agreement between the parties expiring by its terms, on the first day of July, 1944. Although the parties continued, since the expiration of such agreement, to follow the terms and conditions generally contained in such collective bargaining agreement, no binding contract now exists nor has existed since said first day of July, 1944 between the complainant and the union.

5. That on the 6th day of November, 1945, the complainant's plants were both operating on two shifts. At one plant the shift hours were from 8:00 A. M. to 5:00 P. M. for the first shift, and from 3:30 P. M. to 12:00 midnight for the second shift, and at the other plant, from 7:00 A. M. to 3:30 P. M. for the first shift and from 3:30 P. M. to 12:00 o'clock midnight for the second shift.

6. That on said day at about 1:30 in the afternoon practically all of the production and maintenance employees then employed at the two plants of the complainant left their employment at the request and instigation of the respondent union and of the individual respondents, officers and members of the Bargaining Committee of such union, for the stated purpose of attending a union meeting. That on said day none of the night shift reported for work. That on the following day all employees reported for work at the regular hour.

7. Between the 6th day of November 1945 and the 22nd day of March, 1946, on 27 different occasions, at the request and instigation of the respondent union and the individual respondents above named, the production and maintenance employees of the complainant, left their employment during working hours and without the consent of the complainant, to attend union meetings.

8. That all of such work stoppages were engaged in for the purpose of interfering with the production of the com-[fol. 125] plainant and by such interference to induce and compel the complainant to accede to the demands of the union to be included in the collective bargaining agreement being negotiated between the parties.

9. That the respondent union and the individual respondents have publicly stated that it is their intent and purpose to continue to engage in work stoppages similar to the stoppages engaged in on November 6, 1945 and twenty-six times since then, up to and including the 22nd day of March, 1946, for the purpose of inducing and coercing the complainant into compliance with their demands; and have threatened employees that failure to engage in such work stoppages and to attend the union meetings following such stoppage when directed by the respondent union and its officers, will result in punishment to employees of the complainant.

10. That several employees of the complainant who failed and refused to take part in such work stoppages had their locker boxes damaged, clothing cut, ripped and otherwise damaged, tools and other property concealed or injured, and were subjected to assaults and threats of violence. That such acts were committed in the main on the property of the complainant company, by persons unidentified.

11. That the employees within the collective bargaining [fol. 126] unit represented by the respondent union and employed by the complainant, never conducted a vote of any kind at which the union was directed to call a strike and that no strike has been called by the respondent union nor by the employees of the Briggs & Stratton Corporation against the company at any time.

Upon the basis of the foregoing Findings of Fact, the Board makes the following:

Conclusions of Law

1. That the respondent, International Union, U. A. W. A., A. F. L., Local 232, and Anthony Doria, Clifford Matchey, Walter Berger, Erwin Fleischer, John H. Corbett, Oliver Dostaler, Clarence Ehrman, Herbert Jacobsen and Louis Lass are guilty of unfair labor practices by:

(a) Engaging in a concerted effort to interfere with production in a manner other than by leaving the premises in an orderly manner for the purpose of going on strike.

(b) Coercing and intimidating employees by threatening punishment if they fail to engage in such unlawful efforts to interfere with production.

[fol. 127] Upon the bases of the above and foregoing Findings of Fact, and Conclusions of Law, the Board, pursuant to Section 111.07 (4) of the Wisconsin Statutes, makes the following

ORDER

It Is Ordered that the respondent union, International Union, U. A. W. A.-A. F. L. and Anthony Doria, Clifford Matchey, Walter Berger, Erwin Fleischer, John H. Corbett, Oliver Dostaler, Clarence Ehfman, Herbert Jacobsen and Louis Lass shall:

1. Immediately and at all times hereafter while this order is in effect, cease and desist from:

(a) Engaging in any concerted efforts to interfere with production by arbitrarily calling union meetings and inducing work stoppages during regularly scheduled working hours; or engaging in any other concerted effort to interfere with production of the complainant except by leaving

the premises in an orderly manner for the purpose of going on strike.

(b) Coercing or intimidating employees by threats of violence or other punishment to engage in any activities for the purpose of interfering with production or that will interfere with the legal rights of the employees.

2. Take the following affirmative action:

(a) The respondent union and individual respondents shall immediately notify in writing by posting notices in conspicuous places at their respective headquarters or offices in the City of Milwaukee and at any union meeting halls maintained by them, and keep such notices posted for a period of at least thirty days from the date of posting that the respondents will cease and desist in the manner aforesaid.

(b) The respondent union and individual respondents jointly shall cause to be delivered to the Wisconsin Employment Relations Board for posting on the bulletin boards of the Briggs & Stratton Corporation six (6) copies of the notices referred to in paragraph (a) above.

(c) The respondent union and individual respondents shall cause the Wisconsin Employment Relations Board to be notified in writing within five (5) days from the date of receipt of copy of this order what steps the respondent union and individual respondents have taken to comply with this order.

Given under our hands and seal at the City of Madison, Wisconsin, this 11th day of May, 1946. Wisconsin Employment Relations Board, by (S.) L. E. Gooding, Chairman; J. E. Fitzgibbon, Commissioner. (Seal.)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The complainant, above named, operates two manufacturing plants in the City of Milwaukee. At each plant it employs approximately 1,000 production and maintenance employees. These employees now are and since 1937 have been represented by the respondent union. Since that time various written collective bargaining agreements have been entered into between the complainant and the respondent union. The

last agreement entered into between the parties was dated September 17, 1942 and by its terms continued in effect until July 1, 1944. At the expiration of that agreement negotiations were carried on between the parties looking towards the execution of a new agreement. The parties having failed to reach an agreement, the matter was certified to the War Labor Board, then in existence. After V-J Day that Board issued a directive with which the employer has refused to comply.

Negotiations continued between the parties and were being carried on on November 6, 1945. On that day, the union commenced the practice of exerting economic pressure on the employer in an attempt to compel the employer to accede to requests made by the union. This pressure was exerted by a series of short work stoppages. On the afternoon of the 6th of November at about 1:30 practically all of the employees at both plants of the employer left their employment for the purpose of attending a union meeting. The employees on the night shift did not report for work at all that day. The following day all the employees reported for work at the regular hour. Between November 6, 1945 and March 22, 1946, there were twenty-seven (27) similar work stoppages. Some occurred in the morning and some in the afternoon. Sometimes the employees working on the night shift came in on days on which such stoppages occurred and sometimes they did not.

The officers of the union publicly stated that such work stoppages constituted a new labor weapon and that they were instigated and carried on at the direction of the union [fol. 131] and for the expressed purpose of attempting to compel the employer to accede to union demands.

It is the contention of the respondent union that such work stoppages constitute a strike; and the contention on behalf of the employer that such stoppages are in violation of Section 111.06 (2) (h) of the Wisconsin Statutes.

A strike has been defined as being "An act of quitting when done by mutual understanding by a body of workmen as a means of enforcing compliance with demands made on their employer." *Walter Oedein Inc., vs. State*, 177 Wis. 394.

In the dissenting opinion of Justice Crownhart of the case of the *West Allis Foundry Company vs. State*, 186 Wis. 24, certain tests are set forth to be used in determining whether a strike is in existence or not. He said in that case,

"The real test of a strike must be, are the usual concomitants of a strike still attached to the situation; are the men still out; are pickets kept up; are the union and union papers still publishing notices of the strike; is pressure still maintained on the employer by which he is burdened financially or physically and mentally impressed; are men prevented from accepting employment at the plant by reason of the conditions existing with reference thereto; are strike benefits still being paid; is the action of the employees or union in their behalf to maintain the strike, in good faith with some hope of ultimate success? If any or all of these questions may be answered in the affirmative, there is some evidence [fol. 132] of a strike actually existing, and if most of them exist, as they did in this case, then the fact of a strike actually existing is sufficiently established, as the term 'strike' is used in the act before us."

When the union began to engage in these activities it took the position that they did not constitute a strike. It was then the position of the union that these activities might be carried on, the employees not suffer the losses sustained as a result of total unemployment, but that the economic pressure on the employer would be effective in obtaining the desires of the union. It would seem clear that while the act of quitting in this case was done by mutual understanding that it wasn't a quit in the sense of an intention to quit until the demands of the union were granted or an agreement had been reached, but rather an attempt on the part of the employees, by mutual understanding, to determine what hours and under what conditions they would perform any work for the employer.

There are two recent cases, *C. J. Conn Ltd. vs. N. L. R. B.*, 108 Fed. 2nd, 390 and the *N. Y. State Labor Relations Board vs. Union Club of the City of New York*, 286 APP. Div. 516, 52, N. Y. S. 2nd 74, which are quite similar in their facts to the activities engaged in by the employees in this case. Both of those cases in effect hold that where employees withdraw their labor only during limited periods of time, [fol. 133] rather than during the entire working day, and continue to work upon their own notion of the terms which should prevail, which terms are unacceptable to the employer, such acts do not constitute a strike and the employer is justified in discharging the employees, their status as employees being thereby destroyed. Clearly under both the National Labor Relations Act and the New York State

Labor Relations Act, if these activities constituted a strike, the strikers would maintain their status as employees and could not be discharged by the employer for engaging in that type of activity.

Section 111.06 (2) (b) provides it shall be an unfair labor practice for an employee individually or in concert with others "to engage in any concerted effort to interfere with production except by leaving the premises in an orderly manner for the purpose of going on strike." These activities were instigated by the union leadership for the purpose of and because the union felt that the loss occasioned to the employer would result in the union attaining its demands. There can be no question but what continuous work stoppages engaged in during regularly scheduled working hours constitute an interference with production and thus falls directly within the terms of the section of the statutes above quoted. Each employee engaging in such activity might properly be disciplined by the employer for engaging in such activities. It is therefore our conclusion that these [fol. 134] temporary work stoppages do not constitute a strike, that they are clearly in violation of the above quoted section of the statutes and we have, therefore, caused to be entered an order directing the respondents to cease and desist from engaging in such activities.

Dated at Madison, Wisconsin, this 11th day of May, 1946.

Wisconsin Employment Relations Board, by (S.)

L. E. Gooding, Chairman; J. E. Fitzgibbon, Commissioner.

IN CIRCUIT COURT OF MILWAUKEE COUNTY

ANSWER (OMITTING FORMAL PARTS)

Now come the respondents above named, and as and for their answer to the petition of the Wisconsin Employment Relations Board admit, deny, and allege as follows:

I

Admit the allegations of paragraphs 1, 2, 3, 4, 5, 6, and 7.

[fol. 135]

H

Further answering said petition, respondents allege that they have not complied with and do not intend to comply

with the order of the petitioner unless required to do so by this Honorable Court, for the reason that such order denies to respondents rights afforded them by Federal and State Law and penalizes them for having exercised rights assured to them by Federal and State Law among which rights so referred to are the rights to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. That such order is null and void and of no effect whatsoever for the following reasons:

(a) It is contrary to the provisions of Article I, Section 8, Article VI and the Thirteenth and Fourteenth Amendments to the Constitution of the United States, in that it limits rights of the respondents under Federal Law, statute and constitution to peaceably assemble, freely express themselves, to go out on strike, and not to be deprived of life, liberty, or property, without due process of law, and imposes upon them involuntary servitude;

(b) That it is in excess of the statutory authority and jurisdiction of the Wisconsin Employment Relations Board;

[fol. 136] (c) That it is unsupported by substantial evidence in view of the entire record as submitted;

(d) That it is arbitrary and capricious;

(e) That it is not responsive to any provision of Chapter 111 of the Statutes;

(f) That Chapter 111 of the Statutes has been misconstrued and misapplied to the facts in the instant case;

(g) That if any provision of the Wisconsin Statutes is in support of such order, then the Statute, as so construed, and the order, are null and void and of no effect whatsoever because in conflict with the Act of Congress known as the National Labor Relations Act, 29 U. S. Code, 151-166, and in violation of Article I, Section 8, and Article VI of the Constitution of the United States, and the Thirteenth and Fourteenth Amendments thereto.

Wherefore, respondents pray for judgment dismissing the petition herein, and for such other and further relief as to the Court may seem just and equitable.

IN CIRCUIT COURT OF MILWAUKEE COUNTY

STIPULATION (OMITTING FORMAL PARTS)

Whereas the above named Wisconsin Employment Relations Board did on the 8th day of June, 1946 commence [fol. 137] proceedings pursuant to sec. 111.07 (7), Stats., for the enforcement of a certain order entered by said board on the 11th day of May, 1946, and

Whereas the International Union, U. A. W. A., A. F. L., Local 232, Anthony Doria, Clifford Matchey, Walter Berger, Erwin Fleischer, John H. Corbett, Oliver Dostaler, Clarence Ehrman, Herbert Jacobsen and Louis Lass, did on the 5th day June, 1946 commence proceedings pursuant to sec. 111.07 (8) and sec. 227.16 of the statutes for review of said order, and

Whereas the issues in both proceedings are limited to legal questions respecting the validity of said order upon judicial review thereof.

Now, Therefore, It Is Stipulated By And Between the parties to the two above entitled actions by their attorneys that said actions may be consolidated for purposes of hearing, argument and decision.

Dated June 19, 1946.

IN CIRCUIT COURT OF MILWAUKEE COUNTY

JUDGMENT (Omitting Formal Parts)

The above entitled matter having come on for hearing on the 16th day of July, 1946 before the court without a jury upon the return of the Wisconsin Employment Relations Board, Beatrice Lampert, Assistant Attorney General, appearing on behalf of the petitioner, David Previant, ap-[fol. 138] pearing on behalf of the respondents and Jackson Bruce appearing on behalf of the Briggs & Stratton Corporation, and the court having heard the arguments and considered the briefs of counsel and having taken the matter under advisement and having on the 18th day of October, 1946 filed its decision and directions for judgment confirming in part and setting aside in part a certain order of the Wisconsin Employment Relations Board.

Now, Therefore, It Is Adjusted, Ordered And Decreed that the order of the Wisconsin Employment Relations Board entered on the 11th day of May, 1946 in the matter of Briggs & Stratton Corporation, a corporation, complainant, v. International Union, U. A. W. A., A. F. L., Local 232; Anthony Doria, Clifford Matchey, Walter Berger, Erwin Fleischer, John H. Corbett, Oliver Dostaler, Clarence Ehrman, Herbert Jacobsen, and Louis Lass, Respondents, Case III, No. 1173 Cw-64, Decision No. 953 directing said union to cease and desist from certain unfair labor practices and to take certain affirmative action be and the same is hereby modified by striking therefrom paragraph 1 (a) of the cease and desist order appearing on page 3 thereof; and that said order as herein modified be and the same is hereby confirmed and enforced.

[fol. 139] It Is Further Adjudged, Ordered And Decreed that the International Union, U. A. W. A., A. F. L., Local 232, and its officers and agents, and Anthony Doria, Clifford Matchey, Walter Berger, Erwin Fleischer, John H. Corbett, Oliver Dostaler, Clarence Ehrman, Herbert Jacobsen and Louis Lass shall:

1. Immediately and at all times hereafter while this judgment is in effect cease and desist from:

Cocering or intimidating employees of the Briggs & Stratton Corporation by threats of violence or other punishment to engage in any activities for the purpose of interfering with production of said Briggs & Stratton Corporation or that will interfere with the legal rights of any employees.

2. Take the following affirmative action:

(a) Immediately notify in writing by posting notices in conspicuous places at the respective headquarters of the above named union or offices in the city of Milwaukee and at any union meeting halls maintained by them, and keep such notices posted for a period of at least thirty days from the date of posting, that said union and persons above named will cease and desist in the manner aforesaid.

(b) The above named union and individuals jointly shall cause to be delivered to the Wisconsin Employment Relations Board for posting on the bulletin boards of the Briggs & Stratton Corporation six (6) copies of the notices referred to in paragraph (a) above.

(c) The above named union and individuals shall cause the Wisconsin Employment Relations Board to be notified in writing within five days from the date of receipt of copy of this judgment what steps they have taken to comply with this judgment.

Dated October 30th, 1946.

By the Court, (Signed) John C. Kleczka, Circuit Judge.

Admissions of Service (Not printed.)

Notice of Entry of Judgment (Not printed.)

Proof of Service, Admission of Service (Not printed.)

IN CIRCUIT COURT OF MILWAUKEE COUNTY

NOTICE OF APPEAL (Omitting Formal Parts)

Please Take Notice that the Wisconsin Employment Relations Board hereby appeals to the Supreme Court of the State of Wisconsin from that portion of the judgment entered in the above entitled matter in the Circuit Court for Milwaukee County on the 30th day of October, 1946, in favor [fol. 141] of the petitioners and against the respondents, which modifies the order of the Wisconsin Employment Relations Board therein described, entered May 11, 1946, by striking therefrom paragraph 1 (a) of the cease and desist order appearing on page 3 thereof.

Clerk's Certificate (Not printed.)

Proceedings Before Wisconsin Employment Relations Board (Not printed.)

Certificate of Wisconsin Employment Relations Board (Not printed.)

Admissions of Service (Not printed.)

Notice of Hearing (Not printed.)

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS BOARD

COMPLAINT OF BRIGGS & STRATTON CORPORATION

(Omitting Formal Parts)

The complainant above named complains that the respondents have engaged in and are engaging in unfair labor prac-

tices contrary to the provisions of Chapter 111 of the Wisconsin Statutes, and in that respect alleges:

1. Complainant is a Delaware corporation, authorized to engage in business in the State of Wisconsin, and its principal place of business is located in the State of Wisconsin at 2711 North 13th Street in the City and County of Milwaukee and it operates two manufacturing plants in said city and county, one at the address above indicated and the other at 2748 North 32nd Street, in which plants it employs approximately 1800 production and maintenance employees in the manufacturing of various industrial products.

2. The respondent International Union, U. A. W. A., A. F. L., Local 232, referred to herein as the Union, is an unincorporated, voluntary labor association or organization and it has its office at 2709 North 12th Street, Milwaukee 6, Wisconsin, and said Union is the exclusive bargaining agency for complainant's hourly paid employees for the purpose of representing such employees in connection with rates of pay, wages, hours of employment and working conditions.

3. The individual employees, as complainant is informed and believes, are the officers of and also constitute the Bargaining Committee of the said Union and except Anthony Doria and Clifford Matchey are all employees of the complainant.

4. The addresses of the individual respondents, all of whom reside in Milwaukee County, Wisconsin, to the best of the information and belief of the complainant, are as follows:

Walter Berger, 4735 North 51st Street, Milwaukee, Wis.

John H. Corbett, 2438 North 38th Street, Milwaukee, Wis.

[fol. 143] Anthony Doria, 5054 N. Hollywood Avenue, Whitefish Bay, Wis.

Oliver Dostaler, 2455 North 32nd Street, Milwaukee, Wis.

Clarence Ehrman, 1315 West Wright Street, Milwaukee, Wis.

Erwin Fleischer, 3268 North 40th Street, Milwaukee, Wis.

Herbert Jacobsen, 4563 North 28th Street, Milwaukee, Wis.

Louis W. Lass, 2542 North 19th Street, Milwaukee, Wis.

Clifford L. Matchey, 3743-A North 38th Street, Milwaukee, Wis.

5. Since about 1938, the complainant and the Union have, from time to time, entered into a number of labor contracts relating to employment relations between complainant and its employees and the last written contract between the parties expired July 1, 1944 although thereafter, the parties continued in general to operate under its terms.

6. Certain of the terms of said last contract which still govern the parties are as follows:

"The Union agrees that neither the Union nor its members will intimidate or coerce employees on Company premises, and further agrees not to solicit membership or conduct during working hours any Union activities other than those of collective bargaining and [fol. 144] handling of grievances in the manner and to the extent hereinafter provided."

* * * * *

"The regular working week for day workers shall be five days of eight hours per day, namely Monday to Friday, inclusive, with time and one-half being paid for all time worked in excess of eight hours per day and for all work on Saturdays."

* * * * *

"The regular working week for piece workers shall be five days of eight hours per day, namely Monday to Friday, inclusive." (Provision is made for payment of one and one-half earnings for over-time and Saturday work.)

* * * * *

"The Company agrees that there will be no lock-out of its employees, and the Union agrees that there will be no strike, slow-down or stoppage of work, until all peaceable means of reaching a mutually satisfactory decision on any and all problems have been tried."

7. Since about November 6, 1945, the individual respondents, and the Union, acting, as complainant is informed and

believes, upon the orders, direction and instigation of the individual respondents and with their participation and guidance, have engaged and are engaging in a series of unfair labor practices consisting among others of the following acts:

(a) They have coerced and intimidated various employees of the complainant in the enjoyment of their legal rights by [fol.145] such acts as causing clothing, tools, and other property of such employees to be cut, ripped, concealed or otherwise injured or damaged and by subjecting various employees to indignities, assaults and threats of violence, in violation of Section 111.06 (2) (a) Wisconsin Statutes.

(b) They have endeavored to coerce and intimidate this employer to interfere with its employees in the enjoyment of their legal rights by endeavoring to compel this employer by overt and illegal acts to enter into some form of a maintenance of membership agreement, although no election has ever been held with respect thereto in compliance with Section 111.06 (1) (c) Wisconsin Statutes, all in violation of Section 111.06 (2) (b) of said Statutes.

(c) They have hindered and prevented by threats, intimidation, force and coercion, including a series of concerted production interferences, the pursuit of lawful work and employment, in violation of Section 111.06 (2) (f) Wisconsin Statutes.

(d) They have combined or conspired to hinder or prevent, at complainant's plants, the use and disposition of materials, equipment and services, in violation of Section 111.06 (2) (g) Wisconsin Statutes.

(e) They have engaged in repeated concerted efforts to interfere with production by causing many employees [fol.146] frequently, without cause or advance warning, to leave the employer's premises every few days for a few hours at a time, not for the purpose of going on strike, (so respondents claim), but for the express planned purpose of illegally coercing the complainant, and in that connection complainant alleges that on approximately nineteen occasions between November 6, 1945 and February 22, 1946, they have caused such work stoppages and interferences involving on each occasion, upwards of a thousand persons

on one or more shifts and on January 7, 1946 they caused a sit-down to occur involving several hundred persons in many departments, all contrary to the provisions of Wisconsin Statutes, Section 111.06 (2) (h).

(f) They have violated the terms set out in paragraph 6 hereof of said last written contract which terms are in operation between the Company and the Union, in violation of Section 111.06 (2) (c), Wisconsin Statutes.

8. The respondents, through their spokesman, the respondent, Doria, as evidenced by an interview reported on the front page of the Milwaukee Journal of February 10th, 1946, have publicly boasted of their purpose and intent to continue such illegal tactics and unfair labor practices as a device to coerce, illegally, the complainant into compliance with their demands and, as complainant is informed and believes, the individual respondents have actively engaged [fol. 147] in directing, supervising, and carrying out the unfair practices referred to and instructing and requiring the members of the Union to engage in such practices in accordance with the prearranged plan.

9. By reason of the acts and conduct of the respondents, employees of complainant who desire to work are being effectively prevented from or interfered with doing so, and the complainant is now and will continue to be greatly hampered, interfered with and impeded in its operations and production and is sustaining serious loss and damage as the result of the unfair labor practices referred to.

WHEREFORE complainant respectfully requests the Wisconsin Employment Relations Board to enter its order determining the rights of the parties and requiring all of the respondents and members of said Union to cease and desist from continuing the unfair labor practices referred to and also to suspend their rights, immunities, privileges and remedies granted under Chapter 111 of the Laws of the State of Wisconsin and to make such further order as may be proper under the circumstances.

Dated this 23d day of February, 1946.

Verification (Not printed).

[fol. 148] BEFORE THE WISCONSIN EMPLOYMENT RELATIONS
BOARD

ANSWER OF INTERNATIONAL UNION ETC., LOCAL 232

(Omitting formal parts)

Now come the respondents above named by Padway & Goldberg, their attorneys, and as and for an answer to complainant's complaint herein admit, deny, and allege as follows:

I

Admit the allegations of paragraphs 1, 2, 3 and 4 of said complaint.

II

Answering the allegations of paragraphs 5 and 6 deny that the terms of the contract set forth therein are binding upon or still govern the parties thereto since the expiration of the written contract of July 1, 1944.

III

Answering the allegations of paragraph 7 and all subsections thereof, respondents deny that they have in any way committed any unfair labor practices under any of the [fol. 149] provisions of Section 111 Wisconsin Statutes, and in this respect allege that if, in fact, any unfair labor practices or illegal acts were committed by any individual or individuals such acts were neither ordered, directed, instigated, participated in, accepted, ratified or condoned by the respondents.

IV

Answering the allegations of paragraph 8, respondents deny that any of the tactics or practices in which respondents have engaged are illegal or constitute unfair labor practices under Section 111, Wisconsin Statutes.

V

Answering the allegations of paragraph 9, respondents allege that if, in fact, there has been any prevention or interference with work, operations or production, and if, in fact, complainant has sustained any loss or damage, all of

such losses or damages result from the exercise of rights guaranteed to the respondents under the terms and provisions of Section 111 Wisconsin Statutes, the National Labor Relations Act, (49 Stats. 449 (1935), 29 U. S. C. Paragraphs [fol. 150] 151-166 (1940).), and the Fourteenth Amendment to the Constitution of the United States.

VI

Further answering the complaint of the complainant, respondents allege and show to the Board that the complainant is engaged in business affecting interstate commerce as such terms are used in the National Labor Relations Act, and applied by the decisions of the National Labor Relations Board, and the Federal Courts, and that in March of 1938 the National Labor Relations Board assumed jurisdiction over a controversy respecting the representation of employees of the complainant for the purposes of collective bargaining and certified that the respondent Union was the duly designated collective bargaining representative for all hourly paid employees of the complainant, and that from that date to this time such determination has not been set aside, reversed or modified by any appropriate Agency, and has not been challenged by the complainant herein.

[fol. 151]

VII

Further answering the complainant's complaint, the respondents allege that any order which may be entered herein or any Statute upon which such order may purportedly be based, in accordance with the prayer of complainant, would be unconstitutional, void, and of no effect whatsoever because contrary to the provisions of Article I, Section 8, and Article VI of, and the Fourteenth Amendment to the Constitution of the United States in that such order and Statute would limit rights of the respondent under Federal Statute, as well as the right to peaceably assemble, freely express themselves, and not to be deprived of life, liberty, or property without due process of law.

Further Answering Said Complaint, respondents deny each and every allegation, matter, fact, and thing therein contained, not hereinbefore expressly admitted, qualified or denied.

Wherefore, respondents pray that the complainant's complaint be dismissed.

BEFORE WISCONSIN EMPLOYMENT RELATIONS BOARD

Transcript of Record of Hearing

Pursuant to notice, this matter came on for hearing before the Wisconsin Employment Relations Board in the Milwaukee County Court House, Milwaukee, Wisconsin, on Tuesday, March 26, 1946, commencing at 2:00 P. M.

[fol. 152] Present: Chairman L. E. Gooding, Commissioner J. E. Fitzgibbon.

APPEARANCES:

Wood, Warner, Tyrrell & Bruce, by Jackson M. Bruce and Robert Casper, Attorneys, for the complainant Padway & Goldberg, by David Previant for the respondents.

Mr. Bruce: At the time of the conclusion of the hearing in Case No. 11,1157 Ce-176, the Board had under consideration the question of whether the allegations in the company's answer in that case relating to the alleged unfair practices on the part of the union, could be offered by the way of additional defensive matter and I presume we should have a ruling on that.

Chairman Gooding: We are ready to rule on that. That will not be received for that purpose.

Mr. Bruce: I take it then the Board will proceed to make its order and decision on the evidence as given up to the time of the conclusion of the final hearing.

Mr. Previant: Is this going to be a part of the other case.

Chairman Gooding: No.

Mr. Bruce: Mr. Previant has just suggested that it be [fol. 153] stipulated that all evidence taken in the other case just referred to be made a part of the record in this case. I have no objection although we feel such evidence can be covered rather rapidly by witnesses that will be called any way and it might confuse the record. If this proceeding should go further, it might be difficult to obtain testimony from the other case to be added to the record here.

Chairman Gooding: All right.

Mr. Bruce: This is a proceeding brought by the company. It is asserted by the employer that defendants have been guilty of certain unfair labor practices in violation of the Wisconsin Employment Peace Act. It is asserted, and the

evidence will establish, that respondent union is the bargaining representative of certain production employees of the company and that, commencing in early November of 1945 and to the present time, there have been a series of work stoppages and interferences with production commencing at various times during the day and without warning, in which there is a concerted walk off from the job, presumably without reason other than an alleged reason that the employees desire to attend certain union meetings. There have been also a series of intimidating and coercive acts against individual employees which will be developed in the course of the proceedings. It is believed the evidence, when [fol. 154] completed, will establish a violation of a number of subsections of Section 111.06 (2).

RAYMOND W. GRIFFITH, being duly sworn, testified:

Direct examination.

By Mr. Bruce:

I live at 6178 Washington Circle and am employed by Briggs & Stratton, a Delaware corporation operating two plants in the city of Milwaukee. I am Vice-President in charge of manufacturing, and have been an employee of the company for approximately eighteen years.

Briggs & Stratton produce two principal items; a single cylinder gas engine for various portable equipment, and locks for automobiles. There are many kindred products.

The plants of the company are commonly referred to as the East Plant and the West Plant. The company's approximate 2000 employees are about evenly divided between the two plants. The two plants are a mile and a half apart.

As an officer of the company I have participated in company negotiations with the representatives of its employees since 1936. I am familiar in general with the progress of labor relations at the plant.

[fol. 155] The bulk of our production employees are represented by the U. A. W. A. F. L., Local 232 in their labor relations. That union was certified some years ago by the National Labor Relations Board as the bargaining representative of the employees in question. There is no other union which has bargaining relations with us.

The company has from time to time had written contracts with the union covering working conditions, wages, and hours. Exhibit 1 is a copy of the last written contract.

(Exhibit 1 received in evidence over objection that it had no materiality since the contract expired in 1944.)

Negotiations were had between the union and company in June, 1944 with respect to a new contract. The parties could not resolve their differences and the matter was ultimately referred to the National War Labor Board.

Mr. Bruce: Perhaps Mr. Previant at this point we can stipulate some of this material which you suggested before. We can stipulate that following the panel hearing that was held November 10 and 12, 1944 a panel report was made on March 24, 1945. On August 30, 1945 the so-called directive order of the Regional Board of the 6th region was issued. On September 12, 1945 the company filed a petition for review of certain portions of the Regional Board order, the petition being filed for review by the National Labor Relations Board and about September 11 the union filed a petition for reconsideration and review with the National Board. It is further stipulated that about January 17, 1946, a directive order of the National War Labor Board dated December 20, 1945 was received by the parties. That last stipulation can be corrected to indicate the company received its copy of the directive order on January 17, 1946, although the union received its copy on December 31, 1945.

Mr. Previant: We are willing to stipulate with counsel if those things are the facts, but we will object to the materiality of any of such facts with respect to the matters now before this Board.

Testimony of Mr. Griffith Continued:

During the pendency of the case just referred to and after the panel hearing we had negotiations with respect to differences until in the early part of 1945. I was present at the panel hearing.

The parties in the proceeding before the National War Labor Board were the company and this same union. Anthony Doria, one of the respondents in this case was also present at such hearing as were Clifford Matchey, Clarence

Ehrman, Walter Berger, Herbert Jacobsen, and Louis Lass. There were also other persons at that hearing on behalf of both the union and the company.

[fol. 157] At the outset of the panel hearing there were some introductory remarks by the chairman and brief statements of the union position by Mr. Doria and of the company position by Mr. Otto Jaburek, attorney in that proceeding. After the preliminary statements, I recall that the chairman of the panel asked: "The parties are operating under the terms of the expired contract?" I answered "yes".

(Objection to this as immaterial and calling for hearsay testimony overruled).

The union representatives previously mentioned were present and heard this statement. No one made any statement contradictory to the answer that I gave. Since July 1, 1944, the parties have been following in general the terms of the contract, particularly with respect to such matters as seniority, grievance procedure and similar items excepting as modified by agreements.

(Objection that testimony has no bearing on whether we are acting pursuant to an agreement, and that it is incompetent, irrelevant and immaterial over-ruled.)

Some of the questions before the War Labor Board covered maintenance of membership, check off, vacations, wages and similar items. After V-J Day new demands were made on the company by union representatives, primarily relating to wages. There has been a number of bargaining sessions since V-J Day down to the present.

[fol. 158] In November, 1945, the shift hours at the East Plant were from 8:00 A. M. to 5:00 P. M. for the first shift and from 3:30 P. M. to 12:00 midnight for the second. The overlapping of hours is because the second shift is but a small fraction of the first. At the West Plant the schedule is from 7:00 A. M. to 3:30 P. M. and the second shift from 3:30 to midnight. Those have been regularly scheduled working hours for considerable time and are known to all employees.

On November 6, 1945, there were 1544 employees in the bargaining unit represented by the union in question here. Prior to such time the plants had been operating steadily. The largest part of the plant was on a five-day week.

On November 6, 1945, the first walkout occurred at 1:30 in both the East and West plants. No warning was given that anything unusual was to happen and 1322 employes on the first shift walked out. The second shifts, 205 employes, did not report for work. No employes returned that day but on the following morning, everybody came to work as usual.

On November 6, there were materials and regularly scheduled work to be completed. The company intended and desired a day's work. Only 7 employes stayed at work at the East Plant and 10 at the West Plant.

No reason for this walkout was known at that time. No [fol. 159] union officials intimated what was to transpire. We were not told why the employes had left the plant until some time later. No employes were disciplined, layed off or discharged as a result of this occurrence.

Twenty-seven walk-outs occurred from November 6 to March 22, 1946.

The second one was on November 16. At the East Plant, 614 of the first shift walked out at 1:30 P. M., and only 13 remained. The second shift reported for work and worked until midnight. At the West Plant, 746 left at 1:30 P. M. The entire second shift of 182 came in at 3:30 and worked until midnight.

I have prepared an exhibit which shows the shift hours, the number of persons who walked out on each of the walk-outs. I have been reading from such exhibit in testifying concerning the first two walk-outs. The last page is a sort of summary. The lefthand column shows shift hours at each plant; the middle column shows hours worked. The third column shows the number of persons who left the plant and the last column shows the number of employes who stayed and worked. All figures relate to production, hourly paid employes. By adding the number of workers who walked out to the number of workers who remained, one arrives at the total of production employes on any particular day.

[fol. 160] With one exception employes who walked out did not return to the plant before their shift ended. On about the third walk-out the timekeepers came back to work after a meeting and from that time the timekeepers stayed at work. Timekeepers are members of the bargaining unit.

On January 7, 1946, a number of employes at both plants engaged in a sit-down demonstration. It started at various times during the day but in each case it lasted as long as

the particular shift. This consisted in general of a cessation of work by certain employes without their leaving the plant.

I have prepared Exhibit 3 which is a summary with respect to the number of employes who stopped work, the number in each department, and the departments in which the sit-down took place. These figures are broken down between the East and West Plants, and are taken from company records.

(Exhibits 2 and 3 received in evidence.)

About two or three walkouts occurred before I was told why they had occurred. I was told by the Bargaining Committee, which includes some of the respondents referred to in the complaint, including Mr. Doria, that the reason for the walk-out was so employes could attend a meeting of the union. In discussions with the union Bargaining Committee relative to the contract I was informed that the walkouts [fol. 161] were spontaneous and not of the union's official actions—that it was the employes that were causing the walkouts. I received this information about the middle of December.

Generally speaking, at least in the early stages, these walkouts occurred in early afternoon. When the walkouts occurred on the first shift, sometimes the night shift would come in and work and sometimes not. If the night shift returned in one plant it returned in both. It was uniform in both plants.

In more recent weeks some of the walkouts occurred as early as 8:30 A. M. On January 25, the walkout started at 11 A. M., on February 4 at 9:30 A. M.

Referring again to the tabulation, after January 8, 1946, there is a third shift. Prior to such date the number of employes at the West Plant, which was the only plant at which we had a third shift, were so few that we did not deem it a third shift until January 8. After such time we definitely recognized a third shift. The hours of that shift were from 11 P. M. to 7 A. M., and the shift hours at the two plants continues the same for all shifts down to the present.

My tabulation is to March 22nd, last Friday. There have been no occurrences since Friday unless one occurs this afternoon.

These walkouts have greatly curtailed production. Shipments to customers have been delayed. A large

inventory has piled up because our factory is not using materials as fast as they were scheduled to come in.

Work at our plant is scheduled a month or 45 days in advance on the basis of working full time. Such scheduling is dependent upon orders, receipt of materials, delivery date for customers, etc. These walkouts have reduced shipments to a large extent. During the period of these walkouts our general overhead expense is increased. For instance we need certain materials such as crating on the second shift. We normally depend on the first shift to produce it, but since the first shift was not there, the job was forced on the second shift. In that the main amount of work is finished on the first shift, it follows that when the first shift doesn't work and we do assembly work on the second, it is extremely difficult to keep the schedule going at all. Also, during the walkouts, office expense, salaries of office workers who have not walked out, and items of expense such as advertising, taxes and interest have all continued.

Prior to V-J Day we worked a 48-hour week. Within a week after V-J Day, the schedule was reduced to 40 hours a week. Thereafter we used the pre-war plant of scheduling overtime or Saturday work for departments where work was particularly necessary but not operating the entire [fol. 163] plant on the basis of an entire 48 hour week. The Tool Room almost immediately went back on a 53 to 54 hour a week schedule, including overtime and Saturday work as it was necessary to get tools ready for operations in the plant. We were in the process of re-tooling and re-conversion for some weeks. There were other spots throughout the plants, especially the West Plant where we began to use people on over-time and Saturdays. It was not until November 14 that both plants were again placed on a 48 hour week work schedule. This schedule included operating on Saturdays. A notice to that effect was posted, and work was scheduled for Saturdays thereafter. Exhibit 4 is a copy of the notice referred to. I signed the original on behalf of the Company.

After we got back to this full scheduling, employees refused to work Saturdays. I discussed this matter from time to time with the union and told them we were anxious to work. They refused to permit employees to work.

Our plant was open and we intended to operate on December 24th. A number of persons came to work on that date and also on December 31st. I have prepared a tabulation showing

the total hours of work which were available November 6 through March 23 and the hours of work lost or not worked as a result of these walkouts, including time lost January 7, 1946. Exhibit 5 is such tabulation. This also indicates the total hours of pay lost as a result of these walkouts and [fol. 164] other occurrences referred to. The hours of pay column includes the bonus time for working over 8 hours a day or 40 hours a week which increases the amount above the number of hours worked. For example, in a given period at the East Plant, there would have been 917 hours of work available on the first shift, but 993 pay hours, the difference being adding the hours for overtime. This tabulation is broken down to show the facts with respect to each shift at each plant, and includes information as to total hours of pay lost from November 6, 1945 through March 23, 1946.

This series of events has affected the turnover of employees. A great many new employees have come to work but left. There has been an unusual turnover of new employees since November 6.

These walkouts have received considerable publicity in the Milwaukee press. Exhibit 6, the Milwaukee Journal of Sunday, February 10, contains such an article. [The parties stipulate that a story appeared in the Milwaukee press relating to these walkouts.]

On a recent Saturday about half of the employees came to work. We had no advance warning that they were coming except from different employees in the factory through their direct supervisory people. We heard that in the previous meeting they had decided to come to work on Saturday. This meeting was a day or two prior to Saturday. The union contract calls for time and a half for overtime [fol. 165] and Saturday work is such overtime.

After the employees came to work on the Saturday just mentioned the company posted a notice on its bulletin board with respect to any future work on Saturdays. Exhibit 7 is a copy of that notice. Reasons are therein set forth for not scheduling production work on Saturdays.

The bargaining committee of the union told me repeatedly that they would not call a strike at the Briggs-Stratton plant. They have stated that these walkouts are not strikes. These statements were made a number of times in bargaining negotiations on the terms of the contract by members of the bargaining committee. I cannot recall the individual

who made these statements but they were made by someone or other of the respondents in this action.

The company has sustained substantial loss and damage as a result of the production interference I have described. The company has not disciplined, laid off or discharged anyone as yet in connection with these occurrences. I have done everything in my power to induce the bargaining committee to stop this series of walkouts.

The union has insisted on a maintenance of membership clause in the contract down to the present time. No vote has [fol. 166] been taken on the subject under the Wisconsin act until on or about March 21, 1946.

A number of incidents have been reported to me of things that have happened to employees in connection with their relation with other employees. I witnessed a minor incident of this character early in these walkout proceedings at the east plant. Certain women employees on the fourth floor wished to remain at work instead of walking out. A group of employees gathered around them booing and calling names and threatened them that they should walk out with the other employees. I cannot testify as to what the threat was; the threat was more apparent in their actions than any deliberate remarks.

Mr. Doria has stated many times since November 6 that if certain demands with the union were not acceded to there would be further walkouts.

Cross-examination.

By Mr. Previant:

In the operation of our plant we get a substantial quantity of raw material outside Wisconsin. There is no reason why I should know, but my opinion would be that more than 50% comes from within the state. A substantial amount either by weight or dollar-wise comes from within the state. [fol. 167] It is not true that our finished product all goes to plants outside Wisconsin. A good share goes outside the state, but I don't think I could say how great a share. Substantial quantities of automotive locks are sent to Michigan.

Since Local 232 was certified by the National Labor Relations Board as the collective bargaining representative there has been no other representative certified by any other agency. We have recognized that union as the majority representative from 1936 to the present. A recent vote

conducted by the Wisconsin Employment Relations Board showed that more than two-thirds of the employees voted in favor of an all-union agreement as proposed by Local 232.

Since July 1944 the company has followed generally the trends of the contract that expired July 1, 1944. Prior to July 1st we had received notice from the union that it wanted to negotiate a new contract. There is no question in my mind that the agreement by its terms did expire July 1, 1944. Although the contract states specifically and plainly it expires at a certain date, at that time we were in a state of war, and it was my understanding that the government desired the parties should continue to operate under the terms of their contract until a new one was resolved. I think that this actually happened in our case. My opinion is based on my understanding of the national policy during the war. It was my understanding that as long as the country was in [fol. 168] a state of war, orders of the war labor board should be complied with. We appealed to the national board in a legal way in accordance with our legal rights but at the time the board rendered a decision the war had ceased. Because the war had ceased we did not believe we were morally or legally obliged to comply with such order.

Since July 1944 no one on behalf of management has expressly agreed that the old contract should continue until a new one is signed. It was never discussed. I do not recall a discussion over a year ago with Mr. Matchey in which I asked why he permitted union activity on company time. The statement was made that the union was not violating the terms of the contract. I do not recall any conversation such as you have inquired about. I made an entirely different statement than you asked about. The company has never asked that I know of for a statement from the union that the 1944 agreement was in effect. I never asked and I don't believe anybody else has asked for such a statement.

There have been many changes since July 1944 with respect to wages. There have been no changes with respect to minimum rates since July 1944. The bonus was made a part of pay wages. The company has continued to pay double time for Sunday work and time and a half on Saturday up [fol. 169] until the present time. I don't think that employees who worked on Saturday and Sunday were denied premium pay for that work.

Mr. Dorsey is superintendent at West Plant. He has authority to speak for management. It could and could not be

that if Mr. Dorsey said that there was no obligation under any agreement to pay premium wages for Saturday and Sunday work, that that would be expressing a policy of the company.

Changes have been made with respect to vacations. The grievance procedure of the old contract has been followed. Foremen are presented with copies of grievances to stewards in the same manner as before July 1944.

We have not been in the practice of getting the consent of the union to scheduling work on Saturday. Our contract says the regular work week shall be Monday through Friday. We have been operating exactly the same since July 1944 as before. Prior to July 1944 it was customary to change the hours without notification to the union in cases where the number of people involved were few. In other cases I would call the union and tell them to shorten or lengthen a shift. We never considered the five-day week an exact work week. We had a provision in our contract for Saturday work and after operating through the war on a six-day basis I think the six-day week became just as common as the five-day week.

[fol. 170] I was not in the plant January 7, 1946 but was ill at home. I don't know what happened with respect to the alleged sitdown on that day other than what I have been told. I have no knowledge as to whether any union officials tried to stop it other than what I may have been told.

I expressed my opinion to the committee several times about violating the valid existing contract between the company and the union. I stated in negotiations on a new contract that I thought the union had violated the contract. They claimed that they had exhausted all peaceful means of arriving at a settlement and that they had not violated the contract. This was three months ago in December. I had previously claimed that there had been a violation of the 1944 contract. It came up in the conversation several times but I cannot fix the date.

(Union answer to counterclaim by Briggs-Stratton in Case No. II, 1157, Ce-176 received in evidence.)

Mr. Larkin, an accountant in the employ of Briggs-Stratton prepared Exhibit 5. Column 4 states that it is the percentage of lost time to time worked. The comparison is not of time lost to all time available. I don't believe this is deceptive.

The union has not unequivocally insisted on maintenance of membership, if the company would agree to a contract which did not contain clauses which the company desired. [fol. 171] I have been advised that the union has stated that it is willing to forego certain security if the company is also willing to forego certain security.

I think the damage to the company is in direct proportion to the time worked and time lost and if the employees had gone out and remained on strike until now the company losses would be greater.

I believe there were some 19 matters in dispute before the War Labor Board. I believe the company participated fully before the panel of the War Labor Board, the Regional Labor Board, and the National War Labor Board. We filed comments, briefs and appeals. I believe we did challenge the jurisdiction of the board during those proceedings. I am not clear as to whether we challenged jurisdiction during the proceedings or after the final directive came down. To this date the company has not complied with any directives of the National War Labor Board dated December 31, 1945 directing maintenance of membership clause, the check-off clause and grievance procedure clauses in the agreement.

[Stipulation between parties that Briggs-Stratton Company is engaged in interstate commerce under the terms of the National Labor Relations Act.]

[fol. 172] Redirect examination.

By Mr. Bruce:

Any changes made in the contract which has been introduced in evidence respecting wages, vacations, etc. were made as a result of agreement between the company and the union. Union representatives at no time told me they deemed the contract of July 1942 not to be in effect or not to have been continued.

I don't think it is correct to say that the union indicated to me in the course of negotiations that it would not insist on maintenance of membership providing it got certain concessions from the company. The union has offered to make a contract on issues on which the company and union have agreed i.e. the seniority and grievance procedure, vacations and other more minor paragraphs. They suggest we make an agreement on those clauses only and on wages and go on

operating on that basis. The company's position has been that it must know what days and hours it is going to operate.

I have stated in the course of negotiations that I must insist upon a clause which would require the people to work, and to stop these walkouts. The union has stated in substance that it would go along on this basis without the maintenance provisions providing there was no prohibition against them so far as the continuation of the walkouts is concerned.

[fol. 173] ANTHONY DORIA, being duly sworn, testified adversely:

Cross-examination.

By Mr. Bruce:

My name is Anthony Doria. I live at 505 North Hollywood, Whitefish Bay. I am employed by the International Union, UAW AFL as secretary and treasurer.

Headquarters of the International are at 231 West Wisconsin Avenue, Suite 1013. There are some 350 other locals of the International in addition to 232. The general offices of the International are here in Milwaukee but the president is not a resident here. He is Lester Washburn of Oconomowoc. I do not have copies of the articles or charter and by-laws of the International here. The charter would not be available because it is issued and retained by the AFL. I could produce a copy of the constitution tomorrow. The constitution will outline completely my duties as secretary.

One of my duties as an international officer is to advise and counsel local unions in the conduct of their affairs. As to Local 232 I have only acted in the capacity of a trustee of the local union. As trustee I have participated in the affairs of that union particularly with respect to negotiations and relations with Briggs-Stratton Company.

[fol. 174] The president of the local union is John H. Corbett. The membership of the local union is the highest authority under terms of the constitution. Membership elects certain officers and committees as designated in the constitution whose duty is to carry out the direction and desires of the membership. The union officials and bargaining committee have no greater duty to recommend courses of procedure, to prepare the drafts of contracts and to advise

membership with respect to the position to be taken on particular issues than is the right of any other member. The purpose of the committee and officers is to carry out the desires and directions of the membership.

I have actively participated in negotiations between this union and Briggs-Stratton for a number of years. I have more or less acted as a union spokesman. I presented the case for the union before the panel of the War Labor Board. The union was not represented by counsel or attorney other than as I represented them.

I have been full time in union work since about 1936. I am now 37 years old. This is my second term as secretary of the International Union. The first term was two years and the new term started November 26 for another two years. I have been an officer of the local union I believe since 1939, within two years of its inception. I left the employ of Briggs-Stratton at the request of the company to [fol. 175] go into union work. It is approximately correct to say that I have done no other work than union work since I left the company. I have participated in at least a majority of all meetings between the company and union in the last two and one-half years.

I have seen the Milwaukee Journal article previously marked Exhibit 6. I am familiar with the fact that a copy of that article was attached to the answer of Briggs-Stratton in connection with the complaint brought by the union against the company, I have read the article completely.

Sometime prior to February 10 I had an interview with Samuel N. Sherman who I knew to be a reporter for the Milwaukee Journal. I understood that he was generally in charge of Journal labor news reporting. The subject of our discussion was Briggs-Stratton labor relations.

Mr. Sherman stated that he had obtained some information from other people in the plant and that he would write it as he had it or I could clear up some points for him. The testimony which he had was entirely different than the actual conditions surrounding the case. He had been instructed to run a feature article by the paper.

I think I had several telephone conferences with Sam Sherman and one with another member of the Journal staff relative to the preparation of the article.

I don't know whether Mr. Sherman conferred with any [fol. 176] one else besides me. I believe in an effort to reach me he did contact another officer of the International Union

prior to the time he was able to reach me. The principal source of information could be divided between me and the source that he had which prompted him to call me. I would and did give him as nearly accurate information as possible. I gave him factual information and I expressed my own opinions quite at length.

My factual statements were not misquoted in this article but I do not believe the tenor of the article is designed to encourage labor and we certainly believe the article to be more harmful than beneficial. The trend of the article is much in line with what I had said, generally speaking.

(Exhibit 6 received in evidence.)

Looking at the article there are various things which I consider untrue or incorrect. First there is a reference to a new labor weapon on the first page. We have not tried to name it, and it was probably created by the paper to give the article news value and to make it worth while. I did not use the words "new type labor weapon". This was brought in by Sherman and in asking me questions he referred to it as something new and he himself referred to it as such. I did not tell him not to use that expression; it would have done me no good to tell him that.

It is difficult for me to recall the identical words of a telephone conversation. I did not think the paper would devote [fol. 177] as much time and ink as it did or we would have prepared something elaborate.

The only other incorrect reference is the one to neutral boards. This doesn't make sense. I don't know what I did say to him other than I meant any agency of government that might have jurisdiction in these matters. I am referring to the portion of the article on page 2, column three, and the second page, the first paragraph where it says, "Under the new method, Doria explained, meetings are called for any one or more of three possible reasons—any new development in negotiations which might arise with respect to neutral boards, any development in direct negotiations with management and finally, any time the leaderships feel management has started a rumor detrimental to the union's security." I probably used some other expression than neutral labor boards.

We do not know what the name of this series of walkouts is. We know it is a work stoppage, but what you would call it would probably be as good as anything. The Journal called it a new labor movement and I think flattered it

somewhat. I would say definitely that the intent of the work stoppages is to interfere with production. There would be no object of union economic pressure that did not interfere with production.

The plan of walkout was my idea. I was considering something that was not easy. I wanted to avoid the hardship [fol. 178] of a strike and I recommended it to the local union to stave off a full-fledged strike. The membership accepted this in place of a full-time strike. The union contemplated a full-time strike when it met on November 6. The union wanted to use some form of economic pressure particularly when it became evident that the company would not comply with the Board directive, but this method was accepted to replace the full-time strike.

As far as I know the continued use of this is a new feature; however, work-time stoppage is as old as the strike itself.

There was a union membership meeting called to consider a strike last fall. This was one of several things submitted for the consideration of the membership. The bargaining committee and officers of the union considered and agreed that this plan could be submitted as another issue to be considered when the union met for the purpose of voting a strike, but no one took the position as to what would be done until the members acted. I pointed out to the membership the advantages of this procedure as it is my duty in the office I hold. I first pointed out their objective, and when the objective was clearly in mind they could then decide what course to pursue. The objective was to bring economic pressure against the company to force the company to agree to the directive of the board.

[fol. 179]. The primary issue was not the question of maintenance of membership. This union would never have voted that procedure had maintenance of membership been the only issue. It was one of many issues.

Before taking this up with the local, I even reviewed it with officers of the general CIO organization. They did not think it could be done, but said if it works, we will try it. I understand that it has been tried elsewhere. There has been no correspondence with the International on this matter. There has been only oral and telephone conversation. We have requests from approximately 350 local unions on how it works. I have answered none of them. I waited to

see the outcome and when the experiment is completed we will give them the answer.

The membership accepted as their own the recommendation I made, and made it their own instructions to the board. The plan was to be able to have such control that when anything threatened our security in the plant we would be in a position to bring the members together to counteract acts against our union. Control was to be exercised, of course, through the members of the committee and through the offices that the local union holds. The execution of the plan was to follow the instructions of the members in notifying them when the union would create a stoppage of work for the purpose of attending a meeting. The union committee would determine when they felt it necessary to exercise that control on the basis of the authority granted to them by the membership. It was our desire, at least our hopes, that union membership would attend the meetings. Membership is a very substantial portion of the entire production unit.

It was not necessarily one of the features of the plan to notify the company in advance of any contemplated walk-out. Where conditions warranted, the recommendation of the committee to membership was that the steward body, etc., could be advised to notify their foremen at the same time membership was notified. Members were notified as much as fifteen minutes in advance of the walkout. I don't know if the company had advance knowledge or warning of the first walkout.

At conferences which followed these work stoppages, the company did not even mention them. At least four or five conferences were held after the work stoppages started where no reference was made to them at all. I would not say the company restrained its curiosity. The company doesn't want to let on any serious pressure is being brought to bear. The only reference which the company has made to stoppages is to request that provisions be incorporated in an agreement between us that would prevent these work stoppages for the life of the agreement and that has [fol. 181] been the only reference made to them. The union has agreed to do it any way they want, to accept and give security or forego security and we will forget about it. The union has taken the position that it is not going to lock up every possible weapon and grant to the company the right to use anything at its disposal. With reference to the union

security element in the contract, as long as the contract incorporates some semblance of security that guarantees to us the ability to maintain a union without interference from management, we would guarantee to the company that we would not engage in work stoppages during working hours for the life of the agreement and until grievance procedure was exhausted.

The company has been notified that they could be very instrumental in avoiding these meetings if they would quit starting rumors intended to undermine the union. Every walkout has been called for the purpose of attending a union meeting, and the union meetings have been attended by the extreme majority of the people working. I don't think any specific time was set, but the majority of meetings have been held in the afternoon. There has been no refusal to permit the second shift to come in. The second shift refused to come in to work and took such action itself. On many occasions they have decided to go back to work. That is entirely up to the second shift. The real purpose of the walkout has [fol. 182] been to interfere with production, but this did not require the staying out of the second and third shift. This happened because the second and third shift would come to these meetings and in a group vote not to go to work. If they voted to go to work they went.

Returning to the matter of the Milwaukee Journal article, I will be very frank. I had some argument with Sherman on the method in which this article was written. Before answering your question of whether the quotations of my remarks, excepting those already referred to, are correct, I would like to read it over and mark those facts.

With the exception of the two changes that I made a while ago, only one other thing requires correction. The reference to the issue as being an all-union shop. This is not a quotation but a reference. The issue is not an all-union shop, that isn't an issue. Otherwise I would say I have been substantially correctly quoted.

Examination.

By Mr. Previant:

In answering one question for Mr. Bruce yesterday I wanted to point out the so-called pressure in negotiations which I think we are entitled to under the law, was one

important feature of it. There is more than just that one purpose of these stoppages, however, and the other factors [fol. 183] mentioned in that newspaper article are important. The decision to use a program of this kind was predicated on all of these factors.

LUCILE A. KANZORA, being first duly sworn, testified:

Direct Examination.

By Mr. Bruce:

I reside at 2850-A North 21st Street. I am an employee of Briggs & Stratton and will have been in their employ eleven years in September. I do packing and factory clerical work in the West Plant. I have done this type of work for a number of years. I am not a union member. I have been requested from time to time to join the union.

On several occasions I have been approached by the members and I have never at any time given any encouragement. I simply stated I would think it over. In fact, I was told I have had enough time to think it over but I had never stated I would join. On January 7 I started my work as usual and all of a sudden I noticed everybody stopped so I stopped too, I felt in due respect to some of the people that were very nice up there. About 7:25 I noticed several girls walked down to where I was standing and before long a whole group of them were in front of me. Several had approached me with union cards and I repeated to them I would think it [fol. 184] over. They told me I had had enough time to think it over. Around 8 they had all left. At 8:30 they came back and stood there until about 9:30 when there was a meeting. While standing there they booed and heckled and made various remarks during the course of that time. The remarks were derogatory to me.

After lunch I filed correspondence—I asked to have something to do. I worked until about 3:30. I had padlocks on my locker plugged on January 8, 9, 15, 16 and February 19. I purchased three myself and the company furnished me with two. In one case it must have been hammered on the bottom with a hammer. On other occasions papers and matches were stuck way up and another time it had been hammered. The locks had to be sawed off five times to get into the locker.

During the week of January 28, I believe it was on January 28, an unusual number of girls were lined up in the sections of the ladies toilet around twenty minutes to eleven. I waited and they would not let me in. Each time anyone came in, they would stay until a union member was in front of the section. I just stood and waited until all were empty and the girls about through being lined up and I went in and came out. The following day I went in early and had no trouble. On February 1, I went in at 10:25 and as I went in several girls went into the sections and filled them up [fol. 185] except for the first two. I suspected something would happen and before I could get out, over the top of the section came a bucket of water. The back of me got wet.

During this same week, one day I went in and on the first section was "reserved for a scab." I avoided going in there like the rest of the girls.

During the noon hour of February 7 I was sitting in the place where I usually do reading and about 11:10 I noticed some girls came down. I just kept on reading and before long I had everybody there from the various parts of the building heckling, throwing paper clips, pennies and gum at the desk where I was sitting. The usual booing and heckling went on and that afternoon I reported it. I stayed there again the following noon and the same thing happened. They all started coming in, but in the meantime they were spoken to and sent back. Since that time I have been going out at noon.

There were no demands that I join the union, but I have been called a scab and what have you. I have had various remarks hurled at me and several remarks have been made that I have been trying to get around some of the bosses which I don't think is a very nice remark. My husband was in the service but is out now.

On three occasions a new girl has started in our department with me. The first girl came and they walked out that [fol. 186] day at 9:30. The following day they walked out at 1:30. The following Monday she did not come back. We had another girl that worked one day and did not come back. It wasn't the walkout for the second girl but I had seen some of the people talk to her about various things in the plant. The third girl worked one day and before the end of the day one of the fellows on the floor gave her a union card and she did return the following day.

On January 7 a lot of accusations were made and clips, money and gum were thrown. One girl said if I would sign the card she would pay the initiation fee plus one month's dues. I did not even answer. Another girl said she would fix up my clothes for me. There was a reply from another girl said: "What if there is a locker," she could saw that off and take care of that.

I am still working at the plant. I walked out until January. Since a Wednesday, I can't remember the exact date, I haven't gone out. I did walk out in fairness to some of the fellows that had been very nice to me. My own preference was to stay and work.

[fol. 187] Cross-examination.

By Mr. Previant:

I would mark down on another sheet of paper these entries when I got home at night. I jotted them down on this card yesterday, I believe. I don't have the notes with me. I did not keep the notes at the suggestion of anyone else but at my own choosing. I had no specific purpose, just to see how many things could happen.

I quit the union I believe seven years ago this fall. I had been a member from the time it started up until that time. I did not get a promotion from the company about the time I quit the union. My work has changed since I have been employed at Briggs & Stratton. I was employed as an inspector; my present job is packing parts and clerical. I am making more now than when I started.

I do not know the definition that the union gives a scab. In my mind I don't know what is meant when another party calls someone a scab. I presume that it means one who does not belong to the union. I possibly knew if I were called a scab, it was because I refused to join the union. It is my opinion that all of these things happened because I refused to join the union.

I never promised to join the union. I remember having said that as soon as my husband returned from the service I would think it over but I did not know what our plans would be. My only doubt was whether I would continue to work there.

[fol. 188] I was first asked to join at the beginning of November, 1945, before my husband returned. I worked from 1937 until November 1945 without molestation as a

non-union employee. Nobody bothered or disturbed me. I don't recall that I was asked during that time to join the union.

I don't know who plugged those locks. I don't know if it was some non-union man who wanted to get the union in trouble. Several girls were in there when water was thrown at me. I didn't see anyone throw it and I don't know who it was. The particular people I was working with in that department had been pretty nice to me. They were union members and not all of them called me names. I would not say that they did any of these things that I have made note of.

Some individuals feel more strongly about my non-union membership than others. I do not claim any union officers were involved in these things because I don't know. The girls I saw who booed or called me scab were from various parts of the plant. I have never seen, that I can recall, any of the executive board in the group.

Redirect examination.

By Mr. Bruce:

At the time of the water-throwing episode there were other girls I knew in the toilet. I knew them to be union people. After I got the door open after the water-throwing, [fol. 189] I tried every section and all were locked. There were a lot of girls in there and evidently it was quite well known what was to happen because several girls walked in before I did and were waiting when it happened.

(Motion to strike testimony of witness because not tied up with respondent in this case denied.)

CYRIL NICHOLAS NEMMIG, being first duly sworn, testified:

Direct examination.

By Mr. Casper:

I am Cyril Nicholas Nemmig of 2773 North 16th Street. I am an employee of Briggs-Stratton and have been employed there a little over five years. I am a screw machine operator.

On or about November 7, 1945, about the time of the first walkout, I came to work and on the way somebody asked me

if I had walked out and I said no. I had not been in the union before and I did not intend to join now. When I got to work I found my locker lock plugged with paper. I didn't want to break it and I played around with it for quite a while. I had purchased it a short time before. I used the lock only over night and never kept the locker locked during the day. I did not think it necessary as I had no enemies in the plant. I got a hammer and broke the lock. It took about three-quarters of an hour. From that time on I noticed that nobody would talk to me or have any- [fol. 190] thing to do with me. I kept on with my usual work.

A few days later when I came in in the morning my work clothes were soaked with water so I could not use them. Shortly after another walkout I found my street clothes in my locker were soaked. I had not put the lock on because I figured it was useless.

This work was done on the sly and I have no idea who did it. One of the men on the committee asked me to join the union. I had never known him before and I don't know him now. He said he would like to have me with them and I said that things are going on around here that don't make sense and it doesn't make it worth while that I should join the union. I said when a society was worth while people wanted to join and would not have to be forced. He came to me several times after that and I told him I had thought things over and did not care to join.

Similar incidents continued. One time I found "scab" on the locker stenciled with yellow paint. Another time I found crap in the locker. Just before Christmas I found my leather jacket had been so badly cut it could not be sewed up. A patch had to be put on the left arm and in the back. My tools disappeared. I had kept them in a tool locker used as a bench and that lock was also plugged up with lacquer or something. I opened the locker by taking pins out of the hinges.

[fol. 191] On this particular day of the walkout the tools had disappeared. I was prevented from working through the disappearance of my tools. I went to the straw boss and he gave me no satisfaction. Later Mr. Prange came in and he picked up some odd tools that I could use. I got along with those the rest of the day but not very well.

About January third a gasoline tank, one of the motor tanks, was placed behind this same locker. Because of

things happening in the regular locker I had put my clothes in the small tool locker. The gas tank was placed behind this locker with an oil line arranged in such a way that oil would drip on my clothes all day. I fortunately had the clothes wrapped in my jacket, but there was so much oil that it went through the leather jacket and it got on my sweater and pants. This tank had not been placed there before and was a make-shift outfit.

Cross-examination.

By Mr. Previant:

My last name is Nemmig. I am related by marriage to an official of Briggs Stratton. I married Elizabeth Peters. Her uncle is Mr. Wideman who is secretary to the president.

The only person connected with the union with whom I have had conversation was this committeeman. I had three conferences with him, I believe. He tried to present to me [fol. 192] all the advantages of unionism. I told him I did not believe in it. He said things would be a lot better for me if I joined. I believe his name is Jack Corbett. He is sitting in the first row back there. I did not say I had never seen him and could not identify him. I said I did not know him personally. I don't remember all the words Mr. Corbett said to me. I remember that he came to me and said he had known of it or had seen me break open the locker and that he knew things would be better for me if I joined the union. He said that the first time he came to see me. I don't know the date. I made no notes.

When he comes to talk to me I am working at the plant. I am there to think of my work and I certainly cannot go remembering everything he is going to tell me. He said on one occasion that if I wanted to join the union I should come and let him know about it. I did not have time so he came to see me. He knew I had nothing to do with him.

I did not see any of the things happen or any of the persons who did these things.

[fol. 193] MARY FRANKULIN, being duly sworn, testified:

Direct examination.

By Mr. Casper:

I am Mrs. Mary Frankulin of 2721 West Meinecke, an employee of Briggs-Stratton Company since November 6, 1945. I operate a punch press.

(Motion to strike all testimony not related to any of the respondents. Denied.)

I received instructions in regard to performing my work from the guy that gave me my job. He was a company representative. There was a foreman over the guy that gave me the job, but this Jim is the one that gave me the job to work on. He told me everything I needed to know about my work.

I worked right away on that machine because I had worked on a punch press 9 years before. An hour after I started they came up and asked how I liked the job. I said: "I like it." About twelve the steward told me they were fighting for a union and I should join. I told him I didn't know about it yet. About 1:30 the steward told me we were walking out. I walked out with them. The girls told me I should go to the meeting at Jefferson Hall and that it would cost me \$2.00 for every meeting I didn't attend. I didn't go to the first meeting.

[fol. 194] The next day the girls told me I had made too much money the day before. They said I had made \$5.00 in 4½ hours. She said that 96c was the most I should hand in. I said I had handed in already. She said I should tell the timekeeper and that she would fix it up for me.

I told the timekeeper who was sitting in the office with the foreman. The foreman and timekeeper looked at each other and the foreman said: "You tell them to go to hell. There is no limit here on how much you should make or how much you shouldn't."

The timekeeper did not fix it for me. The next day I averaged 1000 an hour at \$1.09 per thousand. I could have done better but didn't want to. They told me not to and have been after me right along. I believe I finished the job the following day and took my time piling everything in the truck so I did not make any more.

The first day they told me I should walk up and sit upstairs a few minutes every hour. I thought of what the foreman would think of me if I should sit on the first day and so I was piling in the truck from one place to another just to waste time.

The steward was there when the girl told me 96c was the limit. Her name is Alice.

The day after they were after me I said, "I don't know if I am able to work because my mother takes care of the [fol. 195] kid and I don't know if she will." I gave this reason until November 30 day after day. Then I told the steward I was in the union in a place I had worked before and that I could get a withdraw card there.

About November 30 I got the card for December for one dollar to join the union. Then they really figured out how much I should make. I think I made more before.

Then I went on another job. Every job you went to somebody was after you. On one particular job we never made much and wanted a raise. I worked for 2½ days and average 1500-1600 like they told me. I went to Jim and asked for a raise. I was told to talk to Al. The girls told me to break the machine. She really is the one that goes from the steward to all new girls. She is a member of the union. She told me so. She told me if I would not go to the meeting it would cost me \$2 or \$10 even when I did join.

Jim told me some other girl made it on the machine. Jim said to wait a few minutes and somebody would time me. Nobody came and after 2 there was a walkout. I went to the employment office and told them I could not make out on this job and the girls say they can't make out either. He called the timekeeper to see how much the girls made on that job. The timekeeper said the girl made an average of 2,000 an hour and that another girl before that 2500 an [fol. 196] hour. They told me at the office if I came in the following day they will time me.

I worked my usual speed while the man timed me. The girls asked me if I wanted a medal from the company. They all yelled at me and were mad and would not talk to me after that. I averaged over 2000.

The girls told me now we won't get a raise. I didn't work on that job long. Something happened to the die.

One day I was in the 4th floor cafeteria with some others when I was told a man wanted to see me down stairs. I went down and he asked me how much I made. He had a slip of paper and said I averaged \$1.12 an hour. He said I dassent make more than 96c. I told him I was working for Briggs-Stratton. I told Alice and another girl if I could make \$1.50 an hour I would do it. I will not listen to anybody.

After this different girls turned their heads away from me and this one girl goes like (indicates spitting). When I work on the machine she faces the other way. That morning she shook her fist at me.

Later I went to the locker room. The girls were there with their coats on. I found cigaret butts and ashes in my boots. I took them to the first floor and showed the foreman. He just shook his head and said he didn't know who did it.

[fol. 197] The girls stayed in the woman's room while I tried to empty the cigaret butts and ashes in the toilet, but there was paste or glue in the inside. I used one roll of toilet paper. I said to the girls that it was low to do something like that. Rose Madauas made faces at me.

I got my black fur coat from my locker and it was covered with sand and ashes. There were two copper wires on my sleeve so I had to take them off before I put it on. I had no lock on my locker then but put one on after that. Twice it has been stuck with gum and had to be broken off.

I have paid no union dues after the first payment.

The man who came and told me how much I should make is Erwin Fleischer.

Cross-examination.

By Mr. Previant:

There are less than thirty in the department where these things happened. Only the new girls are not in the union. I paid my union dues about November 30 for one month.

(Motion denied that testimony be stricken as not material.)

[fol. 198] ELIZABETH SCHULTZ, being duly sworn, testified:

Direct examination.

By Mr. Casper: .

I am Mrs. Elizabeth Schultz of 806 East Ottjen. I am an employe of Briggs-Stratton and have been for eighteen years in September. I am an inspector.

I walked out with them the first time but the second time I refused to. The gangs from the Die Casting Department and in our locker room came out there and booed me, and one steward from the Currans department said they should boot me out. They called me scab and rat and said if I would not walk out I would not have a job. While they were booing Mr. Griffith, Mr. Zabel and Mr. Sinclair came in. I and two more girls stayed and these two girls said our clothes would be wrecked. One of the fellows threatened to pull off my glasses and tramp on them. I don't know his name.

I worked one hour that day and the other girls said we had better go before they damage our homes as they threatened. A few days later the steward from the Curran Department said to the bunch of girls, "The next time she stays it will be the last day because we refuse to work with

Redirect examination.

By Mr. Bruce: .

[fol. 199] A few days later something was all over the lock on my locker. I showed Mr. Zabel and he said the lock would have to be broken and that they would replace it. I should buy a lock and give him bill. They broke open the lock.

I was a member of the union. I have been walking out since because they threatened to do harm.

Cross-examination.

By Mr. Previant:

I haven't paid union dues last year or this year. These people in my department said I should go out but I have been sick a lot and could not afford to go walking out. Two girls came up and Art Sieckert from the Curran Depart-

ment said I should go out. The Curran Department is for pistons and connecting rods.

Some of the people in that department said they wanted to boot me out. A bunch of them were standing there when Mr. Griffith and Mr. Zabel came down. This was the bunch that called me names.

Art Siekert is in the back row in the courtroom. He is connected with the union but I don't know what he is. He goes around and asks people to join the union and tells the stewards when to walk out. As soon as a new employee comes he is right there to ask him.

[fol. 200] Mr. Previant: For the purpose of the record we will state that up until February 8, 1946, Mr. Siekert held no position with the union but that thereafter he has been a member of the Board.

Mr. Bruce: It is completely improper, I think, to produce testimony by statements of this kind. I am willing to let it stand as I have no doubt Mr. Previant's statement is correct.

ELSIE WUSSOW, being first duly sworn, testified:

Direct examination.

By Mr. Casper:

I am Miss Elsie Wussow of 2672 North 41st Street. I am employed at Briggs-Stratton and have been for 21 years. I am in the Inspection Department.

During November of last year they put gum on my coat because I talked to the girl that didn't walk out the second walkout day. The girl was Elizabeth Schultz who stayed and worked.

My coat was in my locker. The steward is Edna Gallagher and we share our locker on another floor. I told her it wasn't nice for anybody to do that to me. She said she supposed they did it only because I talked to Elizabeth.

I have walked out each walkout because I was told. I am a member of the union. If I could have I would just as soon have worked.

[fol. 201] Cross-examination.

By Mr. Previant:

I went to some union meetings but not every one. I am willing to go along with the majority of the union members if they treat me all right. But it wasn't nice when they put gum on my coat. I don't know who did it.

Redirect examination.

By Mr. Bruce:

I have been leaving the plant because if you stay nobody will like you. They want you to go out.

RAUPH BEYER, being duly sworn, testified:

Direct examination.

By Mr. Bruce:

I am Ralph Beyer of 2355 North 57th Street and I work for Briggs Stratton. I have worked there since January 1935 and my work is Production planning and control. I am not now a union member. My job no longer requires union membership. I am not really a worker. I was on November 6, 1945 and was then eligible for union membership.

Because my work keeps me busy overtime, I had been unable to attend some regular monthly union meetings. Therefore I did not know on November 6, 1945, of any proposed walkout. At about 1:30 P. M., I notice a flurry around the office. Other workers said something about a strike or walkout. Meanwhile I received a phone call on the company dial phone. An unidentified voice asked if I was coming to the shipping room. I inquired what it was all about and he stated there was to be a walkout and a meeting at Jefferson Hall. I asked the reason and he said, "You have a wife and child, haven't you." At this point he hung up and I reported the incident to my boss, Gordon Bell. After this I attended the meetings regularly.

Cross-examination:

By Mr. Previant:

I do not know who was on the phone. I have a wife and child.

HARVEY KLAUSER, being duly sworn, testified:

Direct examination.

By Mr. Bruce:

I am Harvey Klauser of 5256 North Bell Isle Drive. I am married and have two children. I have been employed for eleven years by Briggs-Stratton as a paint sprayer. I am not a union member.

I have made notes while sitting back there. The first incident which affected me while working at the plant occurred about December 7th. I went out for dinner and when [fol. 203] I returned on the job my apron had disappeared. I found it on the side of the booth mixed with water and paint. I reported this to Mr. Dorsey, Supl. of the West Plant. He asked me who did it and I didn't know. He said we'd just have to let it go.

My gloves which are furnished by the company disappeared several times. I would leave my work to punch the time clock or go to the men's room and they would disappear. I use these gloves on my job. I found them in the spray tank roughly about eight or nine times. This happened over a period of weeks around December 17.

During the week of December 17th at quitting time I went to get my overcoat which was hanging near my place of work. The back, arm and pocket were saturated with oil and graphite. It could be cleaned but the marks will be there for the life of the coat. I had it cleaned.

I walked out the first two or three times but thereafter I stayed in the plant during walkouts. The incidents I have mentioned started after I failed to participate in the walkouts.

Around the week of January 8th I found my left front and rear tires punctured. They had been punctured with an ice pick or other sharp instrument.

On January 14th, my bowling night, I stopped at a place and the wife had called that I should come home immediately as someone had thrown a brick through a window. I went [fol. 204] home and a big part of a cement block was lying on the kitchen floor and both the kitchen and storm windows were broken.

Exhibit 8, a piece of cement block, admitted in evidence.

Around January 21st I went down to punch my time card and to the men's room. My turntable was missing on my return to my work. I use this to set my motor on to spray before I set it on the truck. Without it I cannot work. We have no extra ones. I looked for Mr. Dorsey but didn't find him. I saw two supervision men who told me to punch my card. I said the turntable was probably in my water tank. I drained the tank and found it. I heard the supervisory men say if they saw or knew of anyone doing this again they should punch their card. So I went down to punch my card the second time and when I returned, the turntable was gone again. It was again in the water tank. Since that time the turntable has not been tampered with. It takes about 7/10th of an hour for draining and refilling. I lost better than an hour that day.

I have been requested from time to time during this period to join the union. I used to go out to dinner with a fellow and he kept telling me I'd better get in or it was going to be hard on me. One day in the plant Walter Berger, I think he is the steward at present, said I'd better get in. He said they would have a closed shop and that I [fol. 205] would be out. I think he is the last party that talked to me.

Cross examination.

By Mr. Previant:

The fellow I went out to dinner with in October was Henry Lowe. He is another worker in the plant but not an officer in the union.

I have had quarrels with other sprayers in our department. I was satisfied with the work; the quarrels were about minor matters.

I am also a musician and often play at our bowling party at the Milwaukee Athletic Club. I have had no trouble with the musicians union. I am not a member. I have never

been approached about membership. I talked to several people about the musicians local but no representative has approached me. I have spoken to members of the musicians union. They did not say I should join but only asked why I did not. I don't need their job.

I had odd jobs before I came to Briggs-Stratton.

Fred F. Zabel, being duly sworn, testified:

Direct examination.

By Mr. Bruce:

I am Fred F. Zabel of 2633 North 84th, Wauwatosa. I am Plant Superintendent of Briggs-Stratton East Plant. I [fol. 206] have been employed as such for five years and have been with the company for thirty-two years.

I have heard the testimony this morning. Some of the persons who testified have been under my supervision. These instances that have occurred have been reported to me or came to my attention. I have seen the gummed locks and damaged clothing, etc. I have other incidents reported to me of the same character.

I overheard a conversation between Frank Slowik and this union steward of Slowik's department about February 15. Slowik was a production employe who started that day. The steward was Richard Havis. A walkout occurred that day at two o'clock.

I had no knowledge of the walkout until about five minutes to two. There was a little confusion near the press room and I asked the foreman what the trouble was. He told me there was to be a walkout at two o'clock. I walked through the department calling the attention of the foreman to keep the men working until two. I told the steward the same thing.

Just about two, Slowik approached the foreman to whom I was talking and asked if he had to go out. The steward, Richard Havis, stood within three feet of us and heard what was said. The foreman and I said, "Go back to work, we are not sending you home." The steward overheard and shaking his finger like this (indicating) "You better [fol. 207] not, we will fix you if you do." He shook his finger as if waving it in his face.

Slowik told the foreman and myself that he had just left a place where there was labor trouble and that he wanted to work. Havis and the others had left by then as it was two o'clock.

I don't know if Slowik was a union member.

On one occasion in January I found the tools of one employe immersed in a wash tank. The employe was Paul Rosenthal who works in the tool room. The tool box was set on end in a cleaner tank of stanisol. Rosenthal did not call this to my attention but I happened to be in the tool room a little later and saw it. This was on January 7.

In addition to the above there were other incidents reported to me that I did not see. I witnessed the incident that Mrs. Schultz testified to.

Cross-examination.

By Mr. Previant:

The stanisol incident occurred on Monday morning when the men reported to work. I presume this happened between Friday night at the close of work and Monday morning. Work in the tool room starts at 8 A. M. on Monday mornings; the Die Casting Department starts at 7 A. M. Only top personnel were working on Saturday; there were no production workers.

[fol. 208] RAYMOND W. GRIFFITH, being duly sworn, testified:

Redirect examination.

By Mr. Bruce:

Witness Nemmig made some reference to a relationship by marriage to one Mr. Wiedeman. Mr. Wiedeman is secretary to the president but is not an officer nor a director of the company.

ANTHONY DORIA, being duly sworn, testified as follows:

Redirect examination.

By Mr. Bruce:

Exhibit 9 is a copy of the Constitution of the International. This is accurate with the exception of possible typographical or grammatical changes which have been authorized. It has been the same since November 1945.

(Exhibit 9 received.)

The articles provide that the secretary-treasurer, my office, is also a member of the International Executive Board. Article 17 is devoted to the subject of strikes. A vote was taken among employees of Local 232 on the subject of a strike on several occasions. I don't recall the dates but one vote was taken in the Bohemian Hall, and subsequently a secret ballot was taken at Jefferson Hall. That was done pursuant to the old constitution. I don't know [fol. 209] anything about whether prior notice of the vote, etc. was given. The meeting I attended at the Bohemian Hall voted by standing. There was a unanimous membership vote against a closed ballot. The second strike vote was taken immediately after our last case before this board and was held on the allegations of the company in their complaint in order to bring about compliance. At one meeting the results of a secret strike vote was 1172 to 7 in favor. I can determine the exact date from the minutes of our meeting. It was at 2:30 P. M., February 15.

There was no notice of the strike vote. Membership of this union have constantly been advised that at every meeting the issues of whether the work stoppages would continue would be up. The secret vote referred to above was this question.

There was no form to the secret ballot. We requested the people to write "yes" or "no" on a blank piece of paper. The question submitted to them was (reading): "Brothers Gen. Schmidt and Arthur Seegert moved that Local 232 in special meeting hereby authorizes the adoption and continuance of special meetings at any time, in order to effectively counteract the anti-union activities of the company." "Before taking the vote the chairman stated that the vote of "yes" will mean you are in favor of the motion and a vote of "no" means you are against the motion."

[fol. 210] After that the ballots were collected by tellers within the meeting. Not to have any question raised as to the balloting, we requested the entire membership to act as witnesses to the tallying and the ballots were tallied before the entire membership. All the ballots used are now in possession of the local union.

Exhibit 10 is a copy of the by-laws of the local. Since our constitution has been amended the local union is in the process of bringing them in conformity with the constitution. These generally are the by laws that were in effect at the local union.

There was no other vote taken in connection with the strike that I know of. I cannot testify with respect to meetings which I did not attend. To the best of my knowledge there have been no other votes taken.

(Exhibit 10 received.)

Redirect examination.

By Mr. Previant:

Exhibit 11 is the minutes of the meeting at Bohemian Hall where the initial action took place.

[fol. 211] RAYMOND KRESS, being duly sworn, testified:

Direct examination.

By Mr. Previant:

I am Raymond Kress, employed by Briggs-Stratton. I work the third shift from eleven to seven. I worked Friday night, March 8, and Saturday night, March 9. I started at 11 P. M., Friday night, and worked until seven A. M., Saturday, and from eleven Saturday night until seven, Sunday morning. I squawked about my pay as I was under the impression that time and a half would be paid all day Saturday and Sunday would be double time. Although I worked seven hours Saturday, I only received time and a half Saturday night for working seven hours Sunday. I received nothing extra for Saturday night. I raised the question with Joe Doyle, head timekeeper at West Plant. When I told him I was short on my check according to the

union contract and the company, he told me right out that there was no contract. If I came in Sunday, then I would get double time, otherwise not. He told me there was no contract.

Cross-examination.

By Mr. Bruce:

Joe Doyle is head timekeeper at West Plant. I have worked that shift since I started at Briggs-Stratton on [fol. 212] February 13. I have worked the same hours throughout February and have been paid the same. I received time and a half Saturday night that ran into Sunday. For the shift that ran into Sunday morning I was paid time and a half for the entire time worked.

I start no shift on Sunday. Mr. Doyle just told me the only time they pay time and a half is if you come in Saturday evening and work on Sunday morning. If I came in on Sunday night and worked Monday, I would be paid double. He said that was the way they always paid.

ARTHUR KOENIG, being duly sworn, testified:

Direct examination.

By Mr. Bruce:

I live at 3443 North Third Street and work for Ziemer's Sausage Company. I sought employment with Briggs-Stratton after my discharge from the army on September 17, 1945. I was employed on October 15th as Stock chaser.

I am married and my wife is a nurse in the same department. I was approached to join the union shortly after I was employed. I was told that there was a waiting period before I joined the union. I was later told I had better join or words to that effect. I was approached at least five or six times over a short period of time. The discussion was [fol. 213] always the same. It would help the union if I was to join and that they tried to help returning veterans more than anything else. I never said I would or that I wouldn't join.

I worked one Saturday morning about two weeks ago and the following Monday I was called a scab throughout

the shop. This was on just one day. I quit the job on January 7th. One morning shortly after I started to work one fellow told me I had better join if I knew what was good for me. He said to walk on the third floor and I would find out why. He said see what was happening to one of the fellows I knew up there. I did not go up. Shortly after a whole group came around and asked me to join. I told them I would rather quit and would be better off. One of the group grabbed my arm and asked me to join. I did not want to be coerced. I quit. I told the superintendent I was quitting and punched out. He urged me to return but I have not gone back.

During the time I was there a number of walkouts occurred. I was not told in so many words to go out, but I did when they called me a scab. I generally walked out when they did.

Cross-examination.

By Mr. Previant:

I can identify the man who held my arm but I don't think he is in the courtroom. I don't know his name. I could not say if he is an officer of the union. I don't think he was.

[fol. 214] I can identify Mr. Corbett here in the courtroom who spoke to me about joining the union. I spoke to him on several occasions but I do not recall the exact time or anything like that. He never grabbed my arm or threatened me with violence. He conducted himself in a gentlemanly manner whenever he spoke to me.

Redirect examination.

By Mr. Bruce:

My friend on the third floor was Harvey Klanser.

FRANK K. SLOWIK, being duly sworn, testified:

Direct examination.

By Mr. Bruce:

I live at 4051 North 16th Street and am employed at Briggs-Stratton. I started about a month ago—around February 16th. Prior to then I worked for International

Harvester. During the war I had training through the War Manpower Commission. I have a card in connection with such training.

Exhibit 14 is a certificate which I obtained from the War Manpower Commission certifying my training. It contains my number and recites that I completed the training within industry and have pledged to apply principles of good union shop relations in my daily work.

[fol. 215] The day I started at Briggs Stratton everybody was going out. The superintendent said he was not telling me what to do but that he wanted me to work. The Steward said, "Well, Frank, you belong to the union?" I said, "yes." "If you belong to the union, you know what's good for you," so I picked up and went out with the bunch.

I don't know the man's name.

My understanding of the card which says, "is pledged to good union job relations in his daily work" means going off the job like this I think going off the job like this is unfair to the company and wrong. If you belong to the union you should play square and should not go to work and spoil everything. I really object to walking out.

I wanted to stay on the job but I went with the majority because of what the steward said. I have attended all meetings they had. I want to be a good union member.

Cross-examination.

By Mr. Previant:

I attended the meeting that day and ever since. At that meeting a secret ballot was conducted as to whether or no the employees wanted to continue that practice. I remember the results that nearly 99% favored going out. I would be opposed to strikes or work stoppages when agreed to by [fol. 216] a majority of the employees. I do not favor that stuff at all.

I know nothing of past relationship between company and union before I started work on February 15. I did not find out at the meetings.

CLIFFORD MATCHEY, being duly sworn, testified:

Direct examination.

By Mr. Previant:

I live at 3743-A, North 38th Street. I am Regional Representative UAW-AFL. I have had this job since March 4th. Before that I was Financial Secretary of Local 232, UAW-AFL. I was the only full-time employe of that union and with the help of the Executive Board, had charge of its office and affairs.

I was employed by Briggs-Stratton from August 15, 1926 or 1927 until I obtained a leave of absence to work for the union on January 6, 1941. During such time I worked regularly as a production worker. Prior to 1941 I was active in union affairs and was one of the original organizers.

Mr. Griffith and I discussed the status of the union quite frequently both on the phone and in person. I recall the conversation wherein the union made charges of the company [fol. 217] tolerating or letting non-union people undermine the union during working hours. I believe Mr. Griffith denied it at first and said, "well, what could I do about it?" If that was the position of the company we would no longer live up to our agreement—it could not be a one way street. This conversation was four months prior to the first work stoppages.

I never agreed with any company official that there was a contract in existence. We never gave this question a direct answer. We never agreed directly to continue the 1944 agreement.

Not until very recently were we charged with violating the 1944 agreement by the stoppages. The only discussion we had would be since the Wisconsin State Labor Board has come into the picture.

A bone of contention between company and union down through the years is that the earnings on specific jobs were too high. Even prior to the union there was a sort of unwritten code which was more in effect than since the union. I have in mind the case of Alice Erdman against John Curran department. The union brought charges that she was not allowed to work Saturday because she was a union steward. Mr. Curran made the statement that she made too much money during the week to be allowed to work for

time and a half on Saturday. Mr. Curran is foreman of the department.

[fol. 218] Anyone with knowledge of piece work or piece workers knows that the fear of the workers is that if they produce more than what is considered a fair day's work, the company time-study men will try to make some change on the job to allow the job to be cut and the only benefit to the worker is to work harder for less money. I would say the union at Briggs-Stratton has increased piece work production because the workers felt they had a chance to defend themselves against wage cuts.

Since the union has represented plant employees, no limitations upon the amount of piece work of any employee has been embodied by any official action or otherwise by the union. I might say that we have cautioned departments where there have been arguments about this that they must not and should not do so. There has been controversy from time to time with respect to certain rates. There are bound to be cases where the work has been slowed down by employees where you are dealing with a great many production workers. The workers will charge that the rate is unfair and the company charges that the people are not working to the fullest possible extent. The union and company have from time to time made adjustments. On one occasion the company made the rate higher and the union subsequently found it had acted on false information presented to them [fol. 219] by the employee and entered into an agreement with the company to correct the situation. We have from time to time asked the company to go into the rate structure, but we have never had too much cooperation on that score.

I have heard of timecards returned to employees with the notation "too high" but have not seen the cards. The union has not directed, requested, or suggested acts of personal violence or damage to property or to any employee of Briggs-Stratton. Not only have we not done this, but we have asked them that they do nothing to jeopardize the union position. I have heard some of the things testified to today by hearsay. As far as I know these incidents have not been officially called to the attention of the union officers. No corporation official has called this to our attention to my knowledge or asked that something be done about this. We have tried to find out who was responsible for these acts but were not successful. These acts are not a part of our bargaining program for Briggs-Stratton.

I have attended meetings at which Mr. Doria spoke in the last six months. He has repeatedly cautioned all members against engaging in individual activities as contrasted with the concerted activities of the union.

The company charged at times during the war years that the union was limiting production. I have always asked for [fol. 220] proof and we have also cited the case of Mr. Curran. I believe at one time the company stated flatly that the union alone was responsible for the curtailment of production in various departments. We were willing to show them where, after we organized the departments, we held to a certain specific amount day in and day out, that the people had stepped up their production by being assured that they would be given a fair play, and where, if there were any cuts that were unjustified, it would be taken care of.

I know what is meant by the expression "cheating" with respect to piece rates. There are as many ways of cheating as there are piece rates. The most prevalent one is where there are bad and good jobs in a department and where with the cooperation of the foreman an employe will work on what we call a "loose rate" and run ahead and then not punch out and go on the bad rate and not punch in on the bad rate until he used up the time and therefore it does not show the bad rate in the light it should be pictured. By taking advantage of the good rate and make it apply to the bad rate the bad rate looks good. The union has called such practices to the company attention repeatedly and asked them to work out a program. The conditions have come about due to the fact that when we have complained about various rates in various departments, the company would always bring out a record where certain individuals were [fol. 221] able to make out on a bad rate through cheating. This cheating reacts to the detriment of those regularly on the bad job because they are expected to keep up the rate of the good job which was involved in the cheating.

Cross-examination.

By Mr. Bruce:

Erwin Fleischer is a trustee of Local 232. He is an officer at the present time and was elected last November.

From what I know, Erwin Fleischer was sent to the department where Mary Frankulin worked to find how it was possible for one individual to make so much money when

the other girls reported it could not be done. We talked it over and I asked him to check and see if the earnings were honest. I was not present. It was no concern of mine what she was earning except we wished to know whether that was the number of pieces turned in or whether there was collusion that would enable her to make that much money on a job that other girls could not make out on. I don't believe he had or did tell her about the limit on her earnings. When he returned he said he had checked on the job and talked to the girl. That much he told me. He didn't tell me what the conversation was. We were interested in whether the earnings were honest.

[fol. 222] With the exception of the time when we tried to get the company to do something about undermining the union, I had no discussion with Mr. Griffith which was concerned with whether the old contract was in effect. It was my contention during this conversation that they were undermining the union. He stated what he could do about it and I answered that in that case there was no contract.

I would say that for a time it was my impression that the terms and conditions of the contract were continued on since July, but certainly not since the War Labor Board directive has come out. We have dealt and handled each grievance on its merits. We can show where we have many grievancees whereby we are asking the company to settle on what we proposed on seniority and also on transfers rather than what had been practiced before. I believe each grievance was handled on its merits and believe we were instructed by the panel chairman of the War Labor Board to abide by the rules we did. I have sat in on hearings with respect to grievancees since July 1944. Sometimes the procedure followed that set up in the 1942 contract, sometimes not. The company has never followed grievance procedure according to any set pattern at any time. I believe the company has alluded to the printed contract to see how the grievance should be settled. I don't believe we have very much be-
[fol. 223] cause we wanted to put in a new method of handling grievancees as soon as possible.

I was present at the War Labor Board panel hearing and remember that Mr. Griffith mentioned the old agreement. I do not remember whether he said the parties were operating under the terms of the expired contract. I believe I told Mr. Griffith specifically when we had this controversy about undermining the union that we were no longer operating

under the terms of the contract. The controversy involved the case of a supervisor on the fifth floor telling people not to join the union nor to pay the union any attention. It was called to the attention of Mr. Griffith at this time that the union was not operating under the old contract. It is based on that conversation and on the fact that the company has not at any time since the directive came out, recognized the directive or any ruling of the War Labor Board.

The company has been following the seniority provision of the contract in connection with layoffs and transfers and so on. I do not believe there have been many lay-offs with the exception of a short period of time. The company has from time to time reported to me changes in rates as called for in the contract. We have had to check them on a few times, they would sort of forget about it and upon being reminded, they would send in a new list.

[fol. 224] I believe I called Mr. Klauser on Saturday morning and asked why he did not come into the union. I believe there was some pressure put on him or people tried to scare him into joining the union. I said he was bound to experience pressure. I told him, I believe, "If you are a Judas you cannot expect to be loved by the people you are working against." The last word I had was he would think it over and let me know. I would not know if it was within a day or two that the brick went through his window. I don't know what night the brick went through the window. I think the first knowledge I had of the case was when Mr. Zabel called Mr. Jacobsen in his office and Herb told me that noon. I don't know the date. I don't know who threw the brick through the window.

ERWIN FLEISCHER, being duly sworn, testified:

Direct examination.

By Mr. Previant:

I work in the Tool Room of Briggs-Stratton. I have worked for the company for eleven years. I am married but have no family.

I heard Mrs. Frankulin testify as to a conversation she claims to have had with me. I recall a conversation with her about six weeks ago. A report came in of the girls which [fol. 225] stated that Miss Frankulin made an excessive

amount of money where the others could make 76c. I was told to investigate as to whether cheating was done because people have a habit of taking a tight job and not punching out or run a good job and punch out ahead and in that way equalize the pay. I am talking about the practice that is prevalent throughout the shop. The result of such practice is you once get hooked on a tight job and you get a low salary of 40c per hour.

I went to the department and asked one of the girls to get May. She came down and I said some girls tell me they can only make 96c and you are making. . . . She interrupted to state that she was only making a dollar. I said the report was that she made \$1.12. She answered that she was now. I asked if she was doing this honestly. She answered "None of your . . . business and started swearing." She continued: "I do not work for the union, I work for Briggs-Stratton, and if them . . . girls want my job they can have it . . ." I saw what character she was and I was all through. I just said, "Listen, May, I don't want any of these piece work rates cut due to cheating. It is all right if you make it honest, but if you are cheating, I want to know it. I have had no other conversation with her at any time. I had never seen her before.

[fol. 226] Cross-examination.

By Mr. Bruce:

I am on the Board of Trustees and have been for a year and a half.

About 98% of production employees belong to the union. The advantage of the practice of cheating I have referred to is to the foremen who try to hide their face from management and are afraid to get into trouble when they see a low rate. They let people work on the day rate and then put them on piece work rate which brings up the piece work rate. Sometimes this is done by union members too, if it is a high rate and they know they are going on a bum rate, use the high rate on the bum rate. We spoke to management to try to get the high rates and low rates adjusted, but management took no effect. A union member benefits if he gets a loose job he would not hand it in and would equalize it on a low, bad job, or the rate would be different. In other words, when, if he gets a "loose" job, he turns in more time on that job than he actually took to

make the pieces and carries over some of that time to the so-called "tighter" job, and that has happened with sufficient frequency that the union has been checking up.

The report was that Mary Frankulin was making more than other girls on that particular job. I was interested to [fol. 227] find out why. I was in her department and had her called. I did not tell her my name but I did tell her why I was there. I asked her how she was making \$1.12 and she flew off the handle. I only had an interview with her for a few minutes and when I saw what character she was. I didn't care how much she was making, only whether she made it honestly. That is the thing I went to see her about and that was all I could ask her. I implied to her at the start that I thought she was cheating. We don't want any cheating.

I don't know when she joined the union. I visited her about November 30th, six weeks ago. I don't know if union representatives kept a penciled notation of what she was making after this conversation.

The report came to me when one of the union employees came to the office. They had checked up on her I guess. The union preferred that these "loose" jobs be not combined to make it a tight job.

JOHN H. CORBETT, being duly sworn, testified:

Direct examination.

By Mr. Previant:

I live at 2438 N. 38th Street and am employed at Briggs-Stratton West Plant. I have been president of Local 232, [fol. 228] since February 8th. Prior to that I was Guide, also an officer of the union.

I heard Mr. Nemmig testify that I had approached him about joining the union. When I first approached Mr. Nemmig we talked about the advantages of belonging. He talked about the disadvantages and he even told me to read the Milwaukee Labor News. There was an article there which he thought would do me good. Other than that I have never threatened him and have talked to him and conducted myself in a gentlemanly manner. I have never told him what might happen if he did not join. All I ever told him

was if he was in the union it would be better for him and everybody else. I did not say things would stop because I did not know what was going on around the shop.

Cross-examination.

By Mr. Bruce:

I think it was at our third meeting that I asked Mr. Nemmig if he had thought it over and he said, the way things had been happening to him he thought his answer would be "no." I never bothered him again. I really would not know if I said "it would be a lot better for you if you joined the union," but I never threatened a man.

[fol. 229] CLARENCE EHRLMAN, being duly sworn, testified:

Direct examination.

By Mr. Previant:

I live at 1315 West Wright and am on leave of absence from Briggs-Stratton. I first started there in 1918 and took leave of absence March 1, 1946. I was elected Financial Secretary of Local 232, replacing Mr. Matchey. This is a full-time job. Prior to March 1, I was president of the local union. Mr. Corbett has taken my job.

I am familiar with the work stoppage on January 7. Shortly after I started Harvey Klauser bumped one of the union boys off his job. He had been on his work for three weeks and had done a very good job. The boys in the department saw this and all threw down their tools and walked around the spray booth. The boys said they would not work as long as this scab was going to. I told them to return to their job and contacted the foreman of the department and told him what had happened. He called Mr. Griffith or Mr. Dorsey on the phone and told me Mr. Dorsey was on the way and that I should try to persuade the boys to go back to work. They refused to do so. This stoppage was not discussed at any union meeting and I had no prior knowledge [fol. 230] of it. I did what I could to get them to work but was not successful.

Cross-examination.

By Mr. Bruee:

This occurred at West Plant. Klauser worked in the Assembly department. This was his first day after being away sick for several weeks. He returned to the job he had previously occupied. He took a union member off the job.

Right after this stoppage another one occurred in the Test Department. A few individual stock chasers stopped that day in the production department. I would not know the exact number who stopped work in the various departments that morning but quite a few.

I don't know why persons stopped work at East Plant this same day. I do know this: The superintendent of the plant and individual foremen in the department made statements prior to this before Klauser took sick that if he came in again in the condition he did, he would be taken off the job. I did not hear people call him a scab that morning. I don't know which day the brick was thrown.

Redirect examination.

By Mr. Previant:

My reference to Mr. Klauser's condition meant that he used to come in late and intoxicated.

[fol. 231] HERBERT JACOBSEN, being duly sworn, testified:

Direct examination.

By Mr. Previant:

I live at 4563 North 28th and am employed as Gauge maker in the Tool Room of Briggs-Stratton. I have worked there for about twelve years. I hold no position with any labor union at the present time but was Recording Secretary prior to March 1. I am familiar with a work stoppage of January 7, 1946 at East Plant.

I had no advance knowledge of the stoppage. I have no knowledge that the union directed or planned it. I had just punched in my card and was alone at the time clock when Paul Rosenthal, another employe in the Tool Room

started cursing me. He accused me of throwing his tool box in the oil tank. He said he didn't know when it was thrown in, but that I was president of the union and had done it. I had not previously known of it. I was upset because he had just broke his leg and was out of work for four or five months. Although the names he had called me called for a fight, I swallowed it but did tell some of the boys what had happened. I had had nothing to do with the matter so why should I take that from him.

[fol. 232] During the ten o'clock lunch period, after the men had called the matter to the attention of the superintendent, Paul was called by the superintendent. Paul had left his machine and gone to the other end of the Tool Room. He repeated before the eighty employees of the Tool Room what he had called me by the time clock. The men refused to go back to work until there was some kind of a show down as they did not like to work with a man of that nature. The superintendent, foreman, myself and the steward told the men to return to work but they refused. Mr. Coughlin, the president, finally arrived around twenty after eleven. He was less interested in our complaint than lecturing us on union activities.

We did not return to work but asked for a meeting of the Executive Board and management after lunch. I think the meeting was held at 3:30 P. M. The shift quit at five o'clock but the men did not work that day. The adjustment was made that the company would protect these people at all times. The man wasn't even asked to apologize for what he had said to me.

• I returned to work the next day.

(Stipulation that witness holds a card similar to Exhibit 14.)

Three men hold these cards in our local. I was an instructor in that industry program and every member that carries a card is entitled to be an instructor to further this training.

[fol. 233]—The actions of the union do not violate the pledge on this certificate.

I typed Exhibit 11 myself. It is the Minutes of the special meeting of Saturday, November 3 at Bohemian Hall. I was present and took the minutes of that meeting in abbreviated long hand and later typed them. I destroyed the

pencil copy. I typed my name on the last page which is wrong practice.

Exhibit 12 is also minutes. These are of a special meeting held February 15th at Jefferson Hall taken and typed the same as Exhibit 11.

Exhibit 13 is the record of balloting of the tellers to determine whether the members are willing to go along with this program of holding special meeting. Each sheet is marked with the names of the tellers who took care of the particular votes.

Chairman Gooding: The action the union took at this meeting with respect to these work stoppages will be received to establish the action which the union took with reference to these work stoppages.

Chairman Gooding: We have ruled on the objection to the receipt of Exhibits 11 and 12. They will be received solely for the purpose of establishing what went on at the meeting and not for the purpose of establishing the truth or falsity of the charges in any of the speeches reported.

[fol. 234] (Exhibit 13 received.)

HERBERT JACOBSEN testified further:

Cross-examination.

By Mr. Bruce:

I wasn't aware of what went on at West Plant the morning of January 7th. I had heard nothing about the Klauser incident. I don't know who threw Rosenthal's tools in the wash tank. I don't know the case at East Plant where the Die Casting room men refused to work. I don't know why 309 persons didn't work at West Plant.

I think the company should use all proper means to protect the rights of all employees. My question to Mr. Coughlin was whether they made a special effort to protect non-union people. He answered "yes", very definitely. He was very mad when he said it and realizing what he said, he changed it.

GENE SCHMIDT, being duly sworn, testified:

Direct examination.

By Mr. Previant:

I live at 4004 West Hope Ave. and am employed at Briggs-Stratton. I have worked there since February 1944. I have seen cards that set forth the days and earnings which [fol. 235] have been marked by the company. Five were sent back to the department I worked in last night. On certain operations the cards had a red ring around them marked "high" denoting they were earning too much per hour on that particular operation. I saw corrections on such cards. One specific card was changed. The number of pieces changed from 170 to 150 pieces. I happened to be standing there when the change was made by the set-up man in the department who acts as supervisor. The cards were brought over by the foreman and sent down from the timekeeping office. They went back there after being corrected. I have seen that many times before.

ANTHONY DORIA testified further:

Redirect examination.

By Mr. Previant:

I was at the special meeting of January 8, 1946. I was informed of the work stoppages sometime during the previous day. We had a meeting as I recall, the afternoon of that day with Mr. Coughlin since Mr. Griffith wasn't at work. That was my first knowledge that these stoppages had occurred on the 8th.

I attended this meeting of the 8th for a specific purpose. I definitely advised the membership, relative to this work stoppage, not to engage in any kind of stoppage or work [fol. 236] interruption that might have any degree of illegality connected with it—that it might jeopardize our program of work stoppage.

I said "You people have been advised repeatedly by me that our program is something upon which no judicial decision has been made. We don't want to jeopardize this program which we think is absolutely legal. Your act of

yesterday may be one that may be construed illegal and connected with this program—it may bring a tinge of illegality to the program we are engaging in.” I told them we did not expect any individual or group to carry on pressure by themselves and that any acts to be taken would be taken in conjunction with the approval of the entire membership, and that no individual or group should take it into his own hands to decide what kind of pressure should be exercised against the company or persons because of feelings existing between them. Many other things were discussed at the meeting.

Recross-examination.

By Mr. Bruce:

One of the purposes of my talk was to tell the membership not to do anything to jeopardize the plan described yesterday of interfering with production.

[fol. 237] OLIVER L. DOSTALER, being duly sworn, testified:

Direct examination:

By Mr. Previant:

I live at 2455 North 32d Street and am employed at the West Plant of Briggs-Stratton. I have been employed there for 19 years. I am presently Recording Secretary of Local 232.

Exhibit 15 was written by myself and is the minutes of an Executive Board Meeting of today, March 27. The meeting was held here in the court house and the entire Executive Board was present. Motion was made, seconded, and unanimously carried:

Mr. Previant: (Reading from minutes) “The Executive Board of Local 232 met in special session . . . for the purpose of . . . clarifying the fact that no contract exists between local 232 AFL and the Briggs-Stratton Corporation. . . . While we deny that there is any contract in existence between Local 232 and Briggs-Stratton Corporation other than individual items during recent contract negotiations, we hereby declare as terminated any contract

which the company or any other person . . . may believe or find to have been in effect since July first, 1944 except those individual items agreed on during the current negotiations . . .

[fol. 238] Cross-examination.

By Mr. Bruce:

There is no doubt in my mind but the motion was adopted. I have been Recording Secretary since March 8. Prior to such time I was Vice-President. No motion was adopted since I was secretary of this type.

This meeting was held this noon at the court house. All of the Executive Committee were present, Mr. Doria, Mr. Matchey. Mr. Previant does not belong to the Executive Board and was not there when the motion was made. We did not discuss this subject with Mr. Previant during the noon hour. I believe Mr. Doria told me we should meet after we adjourned this morning. We never have taken, as far as I know, any official action on whether there was a contract or not up to this time, that is the Executive Board, and this motion was made by Brother Matchey and seconded by Brother Doria and the rest of us thought the motion okay and voted for it.

The word "agency" in the motion might mean the company or any other person or agency. No one said it might be the Wisconsin Employment Relations Board. The Board was not mentioned. To the best of my knowledge, this is the first information the company has had of the adoption of this motion.

[fol. 239] "Except those individual terms agreed on during the current negotiations", refers to items in our contract which were specifically mentioned such as vacation pay, a change of wages in the percentage added on the regular pay, etc. which the company and union have agreed on in the current negotiations. The vacation plan presently in effect is different from the vacation plan in the last printed contract and was agreed upon some months ago. The company has taken the position that they would not sign a contract until all provisions were agreed upon. My reference was not to items which have been agreed upon, but to those which have been put into effect.

Proposed the motion as Brother Matchey made it. The preliminary portion of the minutes prior to the motion was dictated by Brother Doria.

Mr. Previant: As Recording Secretary you will advise the company of the action taken.

A. I will advise them.

Exhibit 15, the whole minutes, received in evidence.

RAYMOND GRIFFITH testified further:

Redirect examination.

By Mr. Bruce:

No notice or letter was received by the company in writing from the union at any time with respect to modification, [fol. 240] change or termination of the contract.

(Objection of Mr. Previant overruled.)

JOSEPH DOYLE, being duly sworn, testified:

Direct examination.

By Mr. Bruce:

I live at 4661 North 29th and am employed as timekeeper at Briggs-Stratton West Plant. I have been so employed since 1928. I don't recall Mr. Kress or the incident testified to by him. I get so many complaints that I don't recall his nor that he stated that there was no contract. We have employees coming in daily with complaints on Saturday pay and I tell them the company routine policy. It is time and a half for work on Saturday and double time on Sunday; and time and a half for work in excess of 8 hours per day. The practice of the company for years has been classify the shift starting Saturday night and ending Sunday morning as a Saturday shift and to pay it as such, etc. There has been no change in this practice for years.

I don't recall saying there was no contract to inquiring employees. In referring to the contract, I may have said

"What contract?" I have told employees that the policy is in agreement with the old contract. No one in management has told me there was no contract. I have nothing to do with the making of a contract.

[fol. 241] RAYMOND GRIFFITH testified further:

Recross-examination.

By Mr. Previant:

I recall that the company submitted a proposed agreement to the union for the term starting July 1, 1944 which was identical to the expired contract. This was submitted in June or July of 1944.

EXHIBIT 1 (Agreement dated September 12, 1942 between Briggs & Stratton and Local 232, and the International Union, U. A. W. of A., affiliated with the A. F. L.) (Not printed).

EXHIBIT 2 (Schedule showing number of employees who worked or walked out, and hours worked during walkout) (Not printed).

EXHIBIT 3 (Report dated March 25, 1946, on sitdown demonstration of January 7, 1946 by Briggs & Stratton) (Not printed).

EXHIBIT 4 (Notice by Briggs & Stratton of 6-day work week, dated November 14, 1945) (Not printed).

EXHIBIT 5 (Schedule of hours of pay and work lost from November 6, 1945 through March 23, 1946 by Briggs & Stratton hourly paid employees because of walkouts and refusal to work) (Not printed).

[fol. 242] EXHIBIT 6 (Milwaukee Journal news article by Samuel N. Sherman entitled "Work Time Meetings New Labor Weapon") (Omitting formal parts).

Spokesmen for the AFL United Automobile Workers international union, after weeks of silence, conceded Saturday that the series of meetings which employees of the Briggs-Stratton Corp. plants have been leaving work to attend are actually a new type labor weapon designed to replace the strike.

Eleven times now since last Nov. 7 the day shifts at the plant have left their jobs to attend the meetings called suddenly without advance notice to the plant management.

"If you called this a new form of strike you would be making a bad mistake," Anthony Doria, international secretary-treasurer of the union here, said Saturday. "It's a labor weapon actually designed to avoid a strike and the hardships which a strike imposes on the workers. We think it's a better weapon than a strike."

Only Cost Is Deductions

According to Doria the new method has several distinct advantages. First it keeps the worker on the payroll, except for the deductions which the company takes for those few hours a week during which he leaves the job to attend the meetings.

[fol. 243] "Men who have been obliged to walk the picket lines for months with no pay checks coming in to feed themselves and their families know one of the worst features of a strike," Doria said.

Secondly, according to Doria, the meetings serve the union's purpose of preventing "company inspired" rumors from wrecking the group's solidarity.

"Defense Against Rumors"

"We analyzed the picture very thoroughly before we arrived at this idea," Doria said, "and the one thing which stood out was the ease with which a group of workers could be split by well timed rumors, usually started in the proper places by some of the supervisory help."

If the rumors did not do it, according to Doria, some proposition for settlement which the company might pass on directly to the workers often did the trick.

Under these circumstances, according to Doria, one of two things happened. The workers either fell in line with an offer or else "became so incensed by company tactics" that they would walk out without authorization and the strike was on.

"Under the new method," Doria explained, "meetings are called for any one or more of three possible reasons—any new development in negotiations which might arise with respect to neutral labor boards, any development in

[fol. 244] direct negotiations with management and finally, any time the leaderships feels management has started a rumor detrimental to the union's security."

Assures Large Attendance

The meetings are always called during the work week and this is the third purpose, Doria said, of making certain that as many workers as possible attend.

"It's not easy to get a worker out of his home on a Sunday to attend a union meeting," he said.

A fourth advantage, according to Doria, is the fact that it puts the company completely on the defensive.

"The meetings are called without warning," he explained, "and take the company by surprise. They find it difficult to make commitments or plan production."

Doria added:

"This can't be said for the strike. After the initial surprise of the walkout the company knows just what it has to do and plans accordingly. If the strike is a weak one the company may try to break it with a back-to-work movement. If it's a strong one they close shop. The important thing is, they know just where they are at. Management can't plan for this new sort of thing.

[fol. 245]

May Lead to Lockout

"Then if, as a last resort management decides to close shop and force the workers out it can properly be called a lockout and raises two questions—one, does the company have to pay unemployment compensation and two, can the lockout properly be construed as an unfair labor practices act in violation of the law."

Doria said the union's new strike weapon is predicated on that section of the national labor relations act which states that "every group of employes is entitled to engage in activities for its mutual aid and protection."

"That's what this activity is for—our mutual aid and protection," Doria explained. "The company probably considers it 'economic pressure' but we call it 'self-defense.'"

One member of the union said Saturday that sometimes his first word of a stoppage came from a union steward walking by and saying, "Go on home, boys; there's going to be a meeting." However, Doria denied that the workers were ever told to go home.

"That's the whole point of it," he explained. "We planned the meetings this way in order to get the biggest possible attendance. We have always called them during the day shift because most of the workers are working that shift."

[fol. 246]

Meet in Three Halls

Doria said that the union delegated a number of men to check the workers as they leave the plants and to check them in again at Jefferson hall, where the meetings are held in three halls, connected by loudspeakers. He estimated that about 1,200 attended each meeting. That is about the number of workers on the day shift.

"Of course, a few will slip away—that can be expected," he said, "but I doubt that it would include more than a dozen or two dozen at the most."

Doria said he believes the new method is original with the AFL union and is being used for the first time. He admitted that it was based on the often used protested work stoppage but with considerable refinements and streamlining.

One of the chief issues in the dispute at the Briggs-Stratton plants, which employ about 1,800 production workers, is the demand for an all-union shop.

EXHIBIT 7 (Notice dated March 15, 1946 by Briggs-Stratton that until further notice no Saturday work is scheduled during weeks in which work stoppages occur) (Not printed).

EXHIBIT 9 (Constitution of the International Union, U. A. W. A.) (Not printed).

EXHIBIT 10 (By-Laws of Local Union 232) (Not printed).

[fols. 247-248] EXHIBIT 11 (Minutes of Special Meeting of Local 232 held November 3, 1945) (Not printed).

EXHIBIT 12 (Minutes of Special Meeting of Local 232 held February 15, 1946) (Not printed).

EXHIBIT 13 (Tabulations of membership vote on motion authorizing adoption and continuance of special meetings at any time) (Not printed).

[fols. 249-250] IN SUPREME COURT OF WISCONSIN —

APPENDIX

in

INTERNATIONAL UNION, U. A. W. A., A. F. L., LOCAL 232,
et al.

v.,

WISCONSIN EMPLOYMENT RELATIONS BOARD, et al.

[fol. 251] IN CIRCUIT COURT OF MILWAUKEE COUNTY

PETITION FOR REVIEW (Omitting formal parts)

The Petitioners above named, by Padway & Goldberg, their attorneys, respectfully pray that the Honorable Circuit Court in and for Milwaukee County, Wisconsin, review the findings of fact, conclusions of law, decision and order made and entered by the Wisconsin Employment Relations Board, and reverse and set aside the same, in the proceeding before that Board entitled "Briggs & Stratton Corporation, a Corporation, Complainant, vs. International Union, U. A. W. A., A. F. L., Local 232; Anthony Doria, Clifford Matchey, Walter Berger, Erwin Fleischer, John H. Corbett, Oliver Dostaler, Clarence Ehrman, Herbert Jacobsen, Louis Lass, Respondents."

Case III, No. 1173 Cw-64, Decision No. 953, which findings of fact, conclusions of law, decision and order were made and filed by said Board on the 11th day of May, 1946. In support of their Petition, your petitioners respectfully show the court as follows:

[fol. 252] 1. Petitioner, International Union, U. A. W. A., A. F. of L., Local 232, is an unincorporated labor association affiliated with the American Federation of Labor, having its office and principal place of business in the City and County of Milwaukee, State of Wisconsin.

2. The individually named Petitioners are officers and members of Petitioner union.

3. The Respondent, Wisconsin Employment Relations Board, and the individual members thereof, constitute an

administrative body existing under and by virtue of Chapter 111, Wisconsin Statutes, 1945, having its principal office in the City of Madison, Dane County, Wisconsin.

4. The respondent, Briggs & Stratton Corporation, is a Delaware corporation authorized to engage in business in the State of Wisconsin, having its principal place of business in Wisconsin in the City and County of Milwaukee.

5. The respondent corporation is engaged in the general manufacturing business, operating two manufacturing plants in the City and County of Milwaukee (State of Wisconsin, at which plants there are employed approximately 2,000 production and maintenance employees in the manufacture of various products.

6. The respondent corporation is engaged in business affecting Interstate Commerce and in Interstate Commerce, and any interruption in its business as a result of a labor dispute or controversy would affect Interstate Commerce [fol. 253] within the meaning of the provisions of the National Labor Relations Act; 29 U. S. Code, 151-166, in that such corporation in its business uses substantial quantities of raw materials which are shipped to it from points outside the State and ships its manufactured product in substantial quantities to points outside the state.

7. In March of 1938, the National Labor Relations Board, pursuant to the terms and provisions of the National Labor Relations Act, assumed jurisdiction over a controversy respecting the representation of the employees of respondent corporation for the purposes of collective bargaining, and certified that the petitioning union was the duly designated collective bargaining representative for all hourly paid employees of the respondent corporation; that such determination has not been set aside, reversed or modified by any appropriate agency, nor has it been challenged by the respondent corporation herein.

8. The findings of fact, conclusions of law, order and decision which petitioners seek to review and set aside in these proceedings were made after hearing on a complaint filed with the Wisconsin Employment Relations Board by the respondent corporation, in which it was alleged that petitioners had engaged in certain unfair labor practices under the terms and provisions of Section 111.06 (2) of the

Wisconsin Statutes, in that petitioners had directed a [fol. 254] number of work stoppages between November 6, 1945 and the 22nd day of March, 1946, in violation of certain specified provisions of the afore cited statute; that the order of the Board directs the petitioners to cease and desist from

“(a) Engaging in any concerted efforts to interfere with production by arbitrarily calling union meetings and inducing work stoppages during regularly scheduled working hours; or engaging in any other concerted effort to interfere with production of the complainant except by leaving the premises in an orderly manner for the purpose of going on strike.

“(b) Coercing or intimidating employees by threats of violence or other punishment to engage in any activities for the purpose of interfering with production or that will interfere with the legal rights of the employees.”

and to post notices that they will so cease and desist, and notify the Wisconsin Employment Relations Board what steps they have taken to comply with such order.

9. That such order, in the light of the findings of fact, conclusions of law, and decision of the Board, as well as in the light of the entire record before the Board, results in denying to petitioners rights afforded them by Federal and State Law and penalizes them for having exercised rights [fol. 255] assured to them by Federal and State Law, among which rights so referred to are the rights to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

10. That such order is null and void and of no effect whatsoever for the following reasons:

(a) It is contrary to the provisions of Article I, Section 8, Article VI and the Thirteenth and Fourteenth Amendments to the Constitution of the United States, in that it limits rights of the respondents under Federal law, statute and constitution to peaceably assemble, freely express themselves, to go out on strike, and not to be deprived of life, liberty, or property, without due process of law, and imposes upon them involuntary servitude;

(b) That it is in excess of the statutory authority and jurisdiction of the Wisconsin Employment Relations Board;

(c) That it is unsupported by substantial evidence in view of the entire record as submitted;

(d) That it is arbitrary and capricious;

(e) That it is not responsive to any provision of Chapter 111 of the Statutes;

[fol. 256] (f) That Chapter 111 of the Statutes has been misconstrued and misapplied to the facts in the instant case;

(g) That if any provision of the Wisconsin Statutes is in support of such order, then the Statute, as so construed, and the order, are null and void and of no effect whatsoever because in conflict with the Act of Congress known as the National Labor Relations Act, 29 U. S. Code, 151-166, and in violation of Article I, Section 8, and Article VI of the Constitution of the United States, and the Thirteenth and Fourteenth Amendments thereto.

11. That the work stoppages directed by your petitioners were so directed as a result of the wilful, deliberate and inexcusable failure of the respondent corporation to comply with the terms and conditions of a Directive Order of the National War Labor Board, and because of the failure of the respondent corporation to engage in good-faith collective bargaining, and in furtherance of the efforts of your petitioners to secure compliance with a Directive Order of the National War Labor Board, and to enter into a collective bargaining agreement with the respondent corporation; that such stoppages were and have been authorized by virtually a 100% secret vote of all of the production employees of the respondent corporation and were directed [fol. 257] by your petitioners at the instance and request of such production workers. That such stoppages, whether denominated strikes or otherwise, were to aid in collective bargaining, and were for the purpose of affording mutual aid and protection to the production employees of the respondent corporation, as is their right and privilege under the Laws of the State of Wisconsin, and the Laws and Constitution of the United States of America.

12. That by virtue of the foregoing, petitioners are aggrieved and directly affected by the order and decision afore referred to.

Wherefore, Petitioners pray that the order of the Wisconsin Employment Relations Board be reversed, set aside, and held for naught.

Verification (Not printed).

Admissions of Service (Not printed).

IN CIRCUIT COURT OF MILWAUKEE COUNTY

NOTICE OF APPEARANCE OF WISCONSIN EMPLOYMENT RELATIONS BOARD (Omitting formal parts)

Please take notice that the respondent, Wisconsin Employment Relations Board, appears in the above entitled matter by its attorneys, John E. Martin, Attorney General, Stewart G. Honeck, Deputy Attorney General and Beatrice Lampert, Assistant Attorney General, and that a copy of all [fol. 258] subsequent pleadings, documents, notices or other papers subsequent to the summons and petition for review are to be served on such attorneys at their offices in the State Capitol, Madison, Wisconsin.

Take further notice that the position of said respondent is as follows:

That the findings of fact, conclusions of law, order and decision which the petitioners seek to review and set aside are not void or unlawful for any of the reasons set forth in the petition for review or for any other reason and alleges that the order complained of is a valid and lawful order.

Wherefore this respondent prays that the petition for review herein be dismissed.

Dated at Madison, this 8th day of June, 1946.

IN CIRCUIT COURT OF MILWAUKEE COUNTY

NOTICE OF APPEARANCE AND STATEMENT OF POSITION OF BRIGGS
& STRATTON CORPORATION (Omitting formal parts)

Please take notice that the above named respondent, Briggs & Stratton Corporation, appears in the above entitled matter by its attorneys, Wood, Warner, Tyrrell & Bruce and that a copy of all subsequent pleadings, documents, notices or other papers subsequent to the summons and petition for review are to be served on such attorneys [fol. 259] at their office, Room 404 Security Building, 213 West Wisconsin Avenue, Milwaukee 3, Wisconsin.

Take notice further that the position of said respondent, Briggs & Stratton Corporation is as follows:

1. The findings of fact, conclusions of law, order and decision of the Wisconsin Employment Relations Board referred to in the petition for review herein do not result in denying to the petitioners any rights afforded them by the Federal or State laws and does not penalize them in any way whatsoever nor prevent them from exercising any legal rights assured them by any Federal or State law.

2. The findings of fact, conclusions of law and order and decision of the said State Board are valid and are not void for any reason set forth in the petition for review or for any other reason whatsoever.

3. This respondent specifically denies all of the allegations contained in paragraph No. 11 of the petition for review.

4. The findings of fact of the Board are supported by the evidence and the conclusions of law, order and decision are valid and the petition for review should be dismissed.

Wherefore this respondent prays that the petition for review herein be dismissed.

Dated at Milwaukee, Wisconsin, this 15 day of June, 1946.

[fol. 260] Admission of service of notice of appearance (Not printed).

Admission of service of notice of appearance (Not printed).

IN CIRCUIT COURT OF MILWAUKEE COUNTY

**NOTICE OF APPEAL OF BRIGGS & STRATTON CORPORATION
(Omitting formal parts)**

Please take notice that Briggs & Stratton Corporation, one of the above named respondents, hereby appeals to the Supreme Court of the State of Wisconsin from that portion of the judgment entered in the above entitled matter in the Circuit Court for Milwaukee County, Wisconsin, on the 30th day of October, 1946, in favor of the petitioners and against the respondents, which modifies the order of the Wisconsin Employment Relations Board of May 11, 1946, described in the said judgment, by striking paragraph 1(a) of the said order, appearing on Page 3 of said order.

Undertaking (Not printed).

Proof of service (Not printed).

Admission of service of notice of appeal. (Not printed).

IN CIRCUIT COURT OF MILWAUKEE COUNTY

**NOTICE OF APPEAL OF WISCONSIN EMPLOYMENT RELATIONS
BOARD (Omitting formal parts)**

[fols. 261-272] Please take notice that the Wisconsin Employment Relations Board hereby appeals to the Supreme Court of the State of Wisconsin from that portion of the judgment entered in the above entitled matter in the Circuit Court for Milwaukee County on the 30th day of October, 1946, in favor of the petitioners and against the respondents, which modifies the order of the Wisconsin Employment Relations Board therein described, entered May 11, 1946, by striking therefrom paragraph 1 (a) of the cease and desist order appearing on page 3 thereof.

Admissions of service of notice of appeal by Briggs & Stratton Corporation (Not printed).

Clerk's certificate (Not printed).

**FOR DECISION, JUDGMENT, PROCEEDINGS BEFORE WISCONSIN
EMPLOYMENT RELATIONS BOARD, AND ORDER OF BOARD, SEE
APPENDIX IN WISCONSIN EMPLOYMENT RELATIONS BOARD V.
INTERNATIONAL UNION, LOCAL 232, ET AL.**

[fols. 273-274] Pleas before the Supreme Court of the State of Wisconsin at a term thereof begun and held at the Capital in Madison, the seat of government of said State on the Second Tuesday, to-wit: the Thirteenth day of August, A. D. 1946.

Present: Hon. Marvin B. Rosenberry, Chief Justice; Hon. Chester A. Fowler, Hon. Oscar M. Fritz, Hon. Edward T. Fairchild, Hon. John D. Wickhem, Hon. Elmer E. Barlow, Hon. James Ward Rector, Justices.

Arthur A. McLeod, Clerk.

Be it remembered that heretofore, to-wit: on the twenty-third day of November in the year of our Lord One Thousand Nine Hundred and Forty-six came into the office of the Clerk of the Supreme Court of the State of Wisconsin, the Wisconsin Employment Relations Board, L. E. Gooding, Henry Rule and J. E. Fitzgibbon, as Members of the Wisconsin Employment Relations Board, and Briggs & Stratton Corporation, a corporation, by their attorneys and filed in said Court their certain Notice of Appeal, according to the statute in such case made and provided, and also the Return to such appeal, of the Clerk of the Circuit Court of Milwaukee County, in said State, in words and figures following, that is to say:

[fol. 275] [Stamp:] Filed Nov. 20, 1946. Leonard A. Grass, Clerk

IN CIRCUIT COURT, STATE OF WISCONSIN, MILWAUKEE COUNTY

Case No. 202-583

INTERNATIONAL UNION, U. A. W. A., A. F. OF L., LOCAL 232;
Anthony Doria, Clifford Matchey, Walter Berger, Erwin
Fleischer, John M. Corbett, Oliver Dostaler, Clarence
Ehrman, Herbert Jacobsen, Louis Lass, Petitioners,

v. . .

WISCONSIN EMPLOYMENT RELATIONS BOARD; L. E. GOODING;
Henry Rule and J. E. Fitzgibbon, as Members of the Wis-
consin Employment Relations Board, and Briggs & Strat-
ton Corporation, a Corporation, Respondents

NOTICE OF APPEAL

To: Leonard A. Grass, Clerk of Circuit Court, Milwaukee
County, Milwaukee, Wisconsin; Padway & Goldberg, At-
torneys, 511 Warner Theatre Building, Milwaukee 3, Wis-
consin; Wood, Warner, Tyrrell & Bruce, Attorneys, 213
W. Wisconsin Avenue, Milwaukee, Wisconsin.

Please take notice, that the Wisconsin Employment Re-
lations Board hereby appeals to the Supreme Court of the
State of Wisconsin from that portion of the judgment
entered in the above entitled matter in the Circuit Court for
Milwaukee County on the 30th day of October, 1946, in favor
of the petitioners and against the respondents, which modi-
fies the order of the Wisconsin Employment Relations
Board therein described, entered May 11, 1946, by striking
[fol. 276] therefrom paragraph 1 (a) of the cease and desist
order appearing on page 3 thereof.

John E. Martin, Attorney General; Stewart G.
Honeck, Deputy Attorney General; Beatrice Lam-
pert, Assistant Attorney General, Attorneys for
Wisconsin Employment Relations Board.

Proof of Service on Padway & Goldberg, filed.

Service admitted November 7th, 1946, by Wood, Warner,
Tyrrell & Bruce.

Filed Nov. 23, 1946. Arthur A. McLeod, Clerk of Su-
preme Court, Madison, Wis.

[fol. 277] [Stamp:] Filed Nov. 12, 1946. Leonard A. Grass, Clerk.

[Stamp:] Filed Nov. 23, 1946. Arthur A. McLeod, Clerk of Supreme Court, Madison, Wis.

IN CIRCUIT COURT, STATE OF WISCONSIN, MILWAUKEE COUNTY
INTERNATIONAL UNION, U. A. W. A., A. F. OF L., LOCAL 232;
Anthony Doria, Clifford Matchey, Walter Berger, Erwin
Fleischer, John H. Corbett, Oliver Dostaler, Clarence
Ehrman, Herbert Jacobsen, Louis Lass, Petitioners,

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD; L. E. GOODING,
Henry Rule and J. E. Fitzgibbon, as Members of the Wis-
consin Employment Relations Board; and Briggs & Strat-
ton Corporation, a Corporation, Respondents

NOTICE OF APPEAL

To Leonard A. Grass, Clerk of Circuit Court, Milwaukee
County, Milwaukee, Wisconsin; Padway & Goldberg, At-
torneys, 511 Warner Theater Building, Milwaukee 3, Wis-
consin; John E. Martin, Attorney General of Wisconsin
as Attorney for Respondents, Wisconsin Employment
Relations Board and the Members Thereof.

Please take notice that Briggs & Stratton Corporation,
one of the above named respondents, hereby appeals to the
Supreme Court of the State of Wisconsin from that por-
tion of the judgment entered in the above entitled matter
in the Circuit Court for Milwaukee County, Wisconsin, on
the 30th day of October, 1946, in favor of the petitioners and
against the respondents, which modifies the order of the
Wisconsin Employment Relations Board of May 11, 1946,
[fol. 278] described in the said judgment, by striking para-
graph 1 (a) of the said order, appearing on Page 3 of said
order.

Wood, Warner, Tyrrell & Bruce, Attorneys for
Briggs & Stratton Corp.

(Appeal bond for \$250 attached.)

Service admitted November 12th, 1946, by Padway &
Goldberg.

Service admitted November 12th, 1946, by Beatrice
Lampert, Assistant Attorney General.

[fol. 279] [Stamp:] Filed Nov. 13, 1946 Leonard A. Grass, Clerk.

[Stamp:] Filed Nov. 23, 1946. Arthur A. McLeod, Clerk of Supreme Court, Madison, Wis.

IN CIRCUIT COURT, STATE OF WISCONSIN, MILWAUKEE COUNTY

WISCONSIN EMPLOYMENT RELATIONS BOARD, Petitioner,

v.

INTERNATIONAL UNION, U. A. W. A., A. F. OF L. LOCAL 232; Anthony Doria, Clifford Matchey, Walter Berger, Erwin Fleischer, John H. Corbett, Oliver Dostaler, Clarence Ehrman, Herbert Jacobsen, Louis Lass, Respondents

Notice of Appeal, Case No. 202-873

To Leonard A. Grass, Clerk of Circuit Court, Milwaukee County, Milwaukee, Wisconsin; Padway & Goldberg, Attorneys, 511 Warner Theatre Building, Milwaukee 3, Wisconsin; Wood, Warner, Tyrrell & Bruce, Attorneys, 213 W. Wisconsin Avenue, Milwaukee, Wisconsin.

Please take notice that the Wisconsin employment relations Board hereby appeals to the Supreme Court of the State of Wisconsin from that portion of the judgment entered in the above entitled matter in the Circuit Court, for Milwaukee County on the 30th day of October, 1946, in favor of the respondents and against the petitioner, which modifies the order of the Wisconsin Employment Relations [fol. 280] Board therein described, entered May 11, 1946, by striking therefrom paragraph 1 (a) of the cease and desist order appearing on page 3 thereof.

John E. Martin, Attorney General; Stewart G. Honeck, Deputy Attorney General; Beatrice Lampert, Assistant Attorney General, Attorneys for Wisconsin Employment Relations Board.

Proof of service on Padway & Goldberg, filed.
Service admitted November 7th, 1946, by Wood, Warner, Tyrrell & Bruce.

[fol. 281] And afterwards to-wit on the 16th day of January, A. D. 1947, the following Notice of Review was filed in words and figures following, that is to say:

[fol. 282] [STAMP] Filed Jan. 16, 1947. Arthur A. McLeod, Clerk of Supreme Court, Madison, Wis.

IN SUPREME COURT, STATE OF WISCONSIN

Case No. —

Case No. 202-873

WISCONSIN EMPLOYMENT RELATIONS BOARD, Petitioner,

vs.

INTERNATIONAL UNION, U. A. W. A., A. F. OF L., LOCAL 232:
et al., Respondents

Case No. 202-583

INTERNATIONAL UNION, U. A. W. A., A. F. OF L., LOCAL 232,
et al., Petitioners,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, et al.,
Respondents

NOTICE OF REQUEST FOR REVIEW AND REVERSAL

To John E. Martin, Attorney General; Stewart G. Honeck, Deputy Attorney General; Beatrice Lampert, Assistant Attorney General; Attorneys for Wisconsin Employment Relations Board. Wood, Warner, Tyrrell & Bruce, Attorneys for Briggs & Stratton Corporation.

Please take notice that the Respondents in Circuit Court Case No. 202 873 who are also the Petitioners in Circuit Court Case No. 202-583 will and hereby do in connection with the appeals taken by the Petitioner in Case No. 202 873, and by the Respondents in Case No. 202 583 request the Supreme Court of the State of Wisconsin to review and reverse paragraphs 1 and 2 (a), (b), and (c) of the judgment from which appeal has been taken by the Petitioner in

Circuit Court Case No. 202 873, and by the Respondents in Circuit Court Case No. 202 583.

Dated January 9, 1947.

Padway, Goldberg & Previant, Attorneys for Respondents, in Case No. 202-873 and Attorneys for Petitioners, in Case No. 202 583.

Service admitted January 11, 1947, by Beatrice Lampert, Asst. Atty. Gen.

Service admitted January 11, 1947, by Wood, Warner, Tyrrell & Bruce.

[fol. 283] And afterwards to-wit on the 8th day of April, A. D. 1947, the same being the 45th day of said term, the following proceedings were had in said causes in this Court:

MILWAUKEE CIRCUIT COURT

INTERNATIONAL UNION, U. A. W. A., A. F. OF L., LOCAL 232, Anthony Doria, Clifford Matchey, Walter Berger, Erwin Fleischer, John H. Corbett, Oliver Dostaler, Clarence Ehrman, Herbert Jacobsen, Louis Lass, Respondents,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, Henry Rule and J. E. Fitzgibbon, as Members of the Wisconsin Employment Relations Board, and Briggs & Stratton Corporation, a corporation, Appellants

WISCONSIN EMPLOYMENT RELATIONS BOARD, Appellant,

vs.

INTERNATIONAL UNION, U. A. W. A., A. F. OF L., LOCAL 232, Anthony Doria, Clifford Matchey, Walter Berger, Erwin Fleischer, John H. Corbett, Oliver Dostaler, Clarence Ehrman, Herbert Jacobsen, Louis Lass, Respondents

And now at this day came the parties herein, by their attorneys, and the argument of these causes having been commenced by Beatrice Lampert, Assistant Attorney General, for the said appellant Wisconsin Employment Relations Board, by Jackson M. Bruce, Esq., for the said ap-

pellant Briggs & Stratton Corporation, and by David Previant, Esq., for the said respondents, and there not being now sufficient time to complete the same, it is hereby continued for further argument.

[fol. 284] And afterwards to-wit on the 9th day of April, A. D. 1947, the same being the 46th day of said term, the following proceedings were had in said causes in this Court:

MILWAUKEE CIRCUIT COURT

INTERNATIONAL UNION, U. A. W. A., A. F. of L., LOCAL 232,
et al., Respondents,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD et al., Appellants
WISCONSIN EMPLOYMENT RELATIONS BOARD, Appellant,

vs.

INTERNATIONAL UNION, U. A. W. A., A. F. of L., LOCAL 232,
et al., Respondents,

And now at this day came the parties herein, by their attorneys, and the argument of these causes having been resumed and completed, and the court not being now sufficiently advised of and concerning its decision herein, took time to consider of its opinion.

[fol. 285] And afterwards to-wit on the 10th day of June, A. D. 1947, the same being the 63rd day of said term, the judgment of this Court was rendered in words and figures following, that is to say:

MILWAUKEE CIRCUIT COURT:

INTERNATIONAL UNION, U. A. W. A., A. F. OF L., LOCAL 232,
Anthony Doria, Clifford Matchey, Walter Berger, Erwin
Fleischer, John H. Corbett, Oliver Dostaler, Clarence
Ehrman, Herbert Jacobsen, Louis Lass, Respondents,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING,
Henry Rule and J. E. Fitzgibbon, as Members of the
Wisconsin Employment Relations Board, and Briggs &
Stratton Corporation, a Corporation, Appellants

Opinion by Justice Fowler

This cause came on to be heard on appeal from the judgment of the Circuit Court of Milwaukee County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the Circuit Court of Milwaukee County, in this cause, be, and the same is hereby, reversed.

And that this cause be, and the same is hereby, remanded to the said Circuit Court with directions to enter judgment in accordance with the opinion.

Chief Justice Rosenberry, Justice Wickhem and Justice Rector dissent.

[fol. 286]. And afterwards to-wit on the 10th day of June, A. D. 1947, the same being the 63rd day of said term, the judgment of this Court was rendered in words and figures following, that is to say:

MILWAUKEE CIRCUIT COURT

WISCONSIN EMPLOYMENT RELATIONS BOARD, Appellant,

vs.

INTERNATIONAL UNION, U. A. W. A., A. F. OF L., LOCAL 232,
Anthony Doria, Clifford Matchey, Walter Berger, Erwin
Fleischer, John H. Corbett, Oliver Dostaler, Clarence
Ehrman, Herbert Jacobsen, Louis Lass, Respondents

Opinion by Justice Fowler

This cause came on to be heard on appeal from the judgment of the Circuit Court of Milwaukee County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the Circuit Court of Milwaukee County, in this cause, be, and the same is hereby, reversed.

And that this cause be, and the same is hereby, remanded to the said Circuit Court with directions to enter judgment in accordance with the opinion.

Chief Justice Rosenberry, Justice Wickheim and Justice Rector dissent.

[fol. 287] Thereupon the opinion of the Court by Justice Fowler was filed in words and figures following, that is to say:

[fol. 288] [Stamp:] Filed June 10, 1947. Arthur A. McLeod, Clerk of Supreme Court, Madison, Wis.

No. 146

IN SUPREME COURT, STATE OF WISCONSIN, AUGUST TERM, 1946
INTERNATIONAL UNION, U. A. W. A., A. F. OF L., LOCAL 232,
et al., Respondents,

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD, et al., Appellants

No. 147

WISCONSIN EMPLOYMENT RELATIONS BOARD, et al., Appellants,

v.

INTERNATIONAL UNION, U. A. W. A., A. F. OF L., LOCAL 232,
et al., Respondents

Appeals from Judgments of the Circuit Court of Milwaukee County: John C. Kleczka, Circuit Judge. Reversed

Action by International Union U. A. W. A. A. F. of L., Local No. 232 and others, against the Wisconsin Employment Relations Board and another, to review a cease and desist order of said Board.

Action by the Wisconsin Employment Relations Board against the International Union, U. A. W. A. A. F. of L., Local 232 and others, for enforcement of the order entered [fol. 289] in the first action.

Judgments in both actions were entered October 30, 1946. The Board and Briggs & Stratton Corporation appeal in the action brought by the union and the individual defendants. From the judgment in the action brought by the Board the Board appeals.

The evidentiary facts are not in dispute. The Briggs & Stratton Corporation was engaged in manufacturing and operating two plants. A contract between the union and the company had expired. The union was the representa-

tive of the employees for the purpose of collective bargaining. Collective bargaining was in process to fix the terms of a new contract. During such bargaining both plants were in operation. While so in operation the employees of the company at the instance of the union and its officers had by concerted action while at work stopped work during their scheduled working hours and remained away until their next scheduled hour for commencement of work. The work was conducted by two shifts. The day shift quit work during their working hours and stayed away until the following morning and then resumed work. The night shift on these occasions when the day shift quit work failed to appear for work during their scheduled hour for work the night of that day and returned for and resumed work at their scheduled hour for commencing work on the next night. The total number of these instances was twenty-seven. In each instance the employees of the shift left in an orderly manner and went directly to attend a union meeting off the premises previously ordered by the union. These meetings were called by certain of the defendants as officers or committees of the union at irregular times. [fol. 290] No advance notice of the meetings was given to either the company or the employees because it was considered that without any notice the stoppages would most lessen production and effect injury on the company. The times were fixed without any other reason or purpose. The employees were told to go forthwith and went as told. The action of the employees was a concerted effort to, and did, interfere with production and was taken as economic pressure to compel the company to comply with the union's demands respecting the terms of the contract being negotiated. It was a concerted action taken for the purpose of interfering with production and it so operated. No secret ballot was taken by a majority of the employees of the collective bargaining unit involved to call a strike precedent to any one of the walkouts, or precedent to the succession of walkouts, although the employee members of the union present at a union meeting did vote, but not by secret ballot, to walk out as might be directed by a committee of the union. No demand was made upon the company that any or a succession of walkouts would be engaged in unless the company conceded to the terms of the new contract as proposed by the union.

The Board upon the evidence found the facts essentially as above stated, and specifically further found—

“That all of such work stoppages were engaged in for the purpose of interfering with the production of the complainant and by such interference to induce and compel the complainant to accede to the demands of the union to be included in the collective bargaining agreement being negotiated between the parties.

“That the respondent union and the individual respondents have publicly stated that it is their intent and purpose to continue to engage in work stoppages similar to the [fol. 291] stoppages engaged in on November 6, 1945, and twenty-six times since then, up to and including the 22d day of March, 1946, for the purpose of inducing and coercing the complainant into compliance with their demands; and have threatened employees that failure to engage in such work stoppages and to attend the union meetings following such stoppage when directed by the respondent union and its officers, will result in punishment to employees of the complainant.

“That several employees of the complainant who failed and refused to take part in such work stoppages had their locker boxes damaged, clothing cut, ripped and otherwise damaged, tools and other property concealed or injured, and were subjected to assaults and threats of violence. That such acts were committed in the main on the property of the complainant company by persons unidentified.

“That the employees within the collective bargaining unit represented by the respondent union and employed by the complainant, never conducted a vote of any kind at which the union was directed to call a strike and that no strike has been called by the respondent union nor by the employees of the Briggs & Stratton Corporation against the company at any time.”

The evidence upon which the last two findings are based is not above stated but it supports each conclusion of fact therein stated.

Upon the facts found the Board concluded, as conclusion of law, that the union and the individual defendants “are guilty of unfair labor practices by (a) engaging in concerted effort to interfere with production in a manner other than by leaving the premises in an orderly manner for the purpose of going on strike”; and (b) “coercing and intimi-

dating employees by threatening punishment if they failed to engage in such unlawful efforts to interfere with production."

[fol. 292] FOWLER, J.:

The two cases above entitled were argued and submitted together, one brought by the Wisconsin Employment Relations Board against a local union and their officers to enforce an order of the Board made upon hearing of a complaint by the Briggs & Stratton Corporation charging the union and their officers with committing an "unfair labor practice"; the other brought by the union and individual defendants against the Wisconsin Employment Relations Board and the corporation to review the order of the Board. Hereinafter the interested parties will be referred to in this opinion as "the union," "the board," "the company," the individual defendants as "the defendants" and the "employees."

Sec. 111.07 (4) Stats. provides that the "final orders" of the Board may "require the person complained of to cease and desist from the unfair labor practice found to have been committed."

The final order of the Board instantly involved required the defendants to cease and desist from:

"(a) Engaging in any concerted efforts to interfere with production by arbitrarily calling union meetings and inducing work stoppages during regularly scheduled working hours; or engaging in any other concerted effort to interfere with production of the complainant except by leaving the premises in an orderly manner for the purpose of going on strike.

"(b) Coercing or intimidating employees by threats of violence or other punishment to engage in any activities for the purpose of interfering with production or that will interfere with the legal rights of the employees."

It is to be noted that the last clause of (a) of the Board's order forbids concerted effort not only to refrain from the particular things enjoined by the first sentence of (a) but enjoins any concerted effort to interfere with production except to leave the premises for the purpose of going on [fol. 293] strike, and this covers doing any one of the things that by the act constitutes an unfair labor practice.

That statute so far as applicable and material to the instant case may be stated as follows:

"Sec. 111.06 (2) It shall be an unfair labor practice for an employe individually or in concert with others:

"(a) To coerce or intimidate an employe in the enjoyment of his legal rights; . . . or to injure the . . . property of such employe . . .

"(e) To cooperate in engaging in (or) promoting . . . any . . . overt act concomitant of a strike unless a majority in a collective bargaining unit of the employes of an employer against whom such acts are primarily directed have voted by secret ballot to call a strike." . . .

"(h) . . . to engage in any concerted effort to interfere with production except by leaving the premises in an orderly manner for the purpose of going on strike."

It appears from the findings of fact of the Board set out in the statement preceding the opinion that the defendants committed the unfair labor practice proscribed by above paragraphs (a), (e) and (h).

We will first discuss the unfair labor practice committed under (e). It is to be noted that par. (e) involves cooperation in engaging in overt acts concomitant of a strike. Walking out and refraining from work, and not appearing for work for the purpose of exerting economic pressure are plainly concomitants of a strike, and so doing is an overt act. Cooperation in so doing by plainest implication is prohibited unless the majority of the employes of the collective bargaining unit by secret ballot have voted to go on strike. There was here no such vote to go on strike. The only vote taken was voiced on the hypothesis and understanding that the act or acts involved was not or were not strikes, and the vote was not by secret ballot. The employes are manifestly guilty of an unfair labor practice [fol. 294] under (e). All of the defendants are guilty of an unfair labor practice and are also so whether they walked out or refrained from work or not under sec. 111.06 (3) because they "caused to be done" those things. Sec. 111.06 (3) reads:

"Sec. 111.06 (3) It shall be an unfair labor practice for any person to do or cause to be done on behalf of or in the interest of employers or employes, or in connection with or

to influence the outcome of any controversy as to employment relations any act prohibited by subsections (1) and (2) of this section."

Taking up the commission of an unfair labor practice under par. (h); the validity of par. (a) of the order made by the Board depends on the meaning of the word "strike" as used therein, and that meaning turns on the meaning of the word as used in the statutes defining unfair labor practices. The word is used in pars. (c) and (h) of sec. 111.06 (2). The respondents claim that leaving the premises as the employees did with intent to resume work at the commencement of their next shift constituted a strike under par. (h) and that consequently the walkouts did not constitute an unfair labor practice, although they and the members of the union unquestionably understood and claimed when the walkouts occurred that they were not strikes. Throughout the controversy between the employer and its employees, the employees and their leaders contended that the activity in which they were engaged did not constitute a strike. It was described by the leaders as a labor weapon designated to avoid a strike and the hardship which a strike imposes on the employees; they claimed it was a better weapon than a strike. The appellants claim that such conduct did not constitute a strike and consequently did constitute an unfair labor practice under par. (h).

[fol. 295] It is fundamental that in construing a statute the words therein are to be given the meaning they commonly were understood to have at the time the statute was passed. 59 Corpus Juris, 1137, sec. 673. The meaning of the word "strike" in par. (h) must be construed according to that rule. Ch. 111 Stats. was enacted by Ch. 57, Laws of 1939. Before that time this court had defined the meaning of the word "strike" in a statute relating to labor disputes in *Oeflein Inc. v. State*, 177 Wis. 394, 188 N. W. 633. In that case a statute, sec. 1729 p-1, Stats. 1919, sec. 103.43 Stats. 1945, prohibited an employer from advertising for help when in fact a strike was in progress without stating in the advertisement the existence of the strike. The defendant was prosecuted for so advertising. The court said in the opinion, p. 399:

"The legislature did not see fit to define the term 'strike' but on the contrary used the term in the sense that it is

ordinarily used in connection with labor troubles and as defined by standard authorities upon the subject."

The court at p. 399 quoted Webster's New International Dictionary in defining the word "strike" as "An act of quitting when done by mutual understanding by a body of workmen as a means of enforcing compliance with demands made on their employer" and referred generally to "numerous other definitions of the term 'strike' (that) . . . appear in law dictionaries and decisions, all of which . . . substantially include the elements contained in the definition . . ." quoted from Webster.

In 2 Restatement, Law of Torts, sec. 797, it is stated:

" . . . it is not a strike if the employees temporarily stop work without making a demand upon the employer or [fol. 296] using the stoppage as a means of exacting a concession from him, even if the stoppage is against his will."

This idea is embodied in the *Oefflein Case*, supra, where it is said that to constitute a strike, p. 399:

" . . . it first becomes incumbent upon the members or representatives of such unions to make a demand upon the employer in order to lay the basis for a refusal. Such view is in harmony with the fundamental thought underlying the definition of a strike under the common acceptance of the term, and it logically follows that it is contemplated that a strike exists after the demands of the employees are made and refused, as the result of which the employees are withdrawn from the employment."

The phrase above "withdrawn from employment," implies something more than the temporary quitting with intent to resume commencement of work on the next shift. It implies a continuous withdrawal until the object of the strike is obtained or the strike abandoned.

As bearing upon the continuation of the stoppage of work being necessary to constitute a strike, sec. 103.43 (1a) is informative. It was in existence when Ch. 111 was enacted. It reads, so far as here material:

"A strike . . . shall be deemed to exist as long as . . . unemployment on the part of the workers affected continues; . . ."

This plainly implies that to constitute a strike there must be a continuance of unemployment. There was no unemployment here; certainly there was no continuance of unemployment.

From the above we think it clearly follows that the employees did not engage in the stoppages of work involved for the purpose of "going on strike" and that the concerted effort to interfere with production constituted an unfair labor practice under par. (b) of sec. 111.06 (2). The union and the individual defendants caused the walkouts and the ~~refraining from work~~ for the purpose of interfering with production above quoted and under sec. 111.06 (3) they [fol. 297] were all guilty of an unfair labor practice whether they in fact were among the employees who did those things or not.

We also think par. (b) of the order of the Board is valid because the union and the individual defendants were guilty of an unfair labor practice for coercing and intimidating employees contrary to par. (a) of sec. 111.06 (2) in the enjoyment of their legal rights. It was certainly a legal right of the employees to continue their work if they wanted to. The injury to property of such employees was undisputably proven even though their names were not determined by the Board. The prohibition of the cease and desist order operates on the individual members of the union as well as upon the union's officers, although the individual members are not named as defendants. The union is only an association of its members and whatever is forbidden to the union is forbidden to its members.

The order of the Board is criticised because it purports to ban employees from quitting work for the purpose of going to work elsewhere, or with intention of not resuming employment with the instant employer for whatever reason. The order has no such far-reaching effect either upon individuals or upon employees acting in concert. What (a) does, and all that it does, is to ban the individual defendants and the members of the union from "engaging in concerted effort" to interfere with production by doing the acts instantly involved. Par. (b) of the order does not use the word "concerted" before the word "activities," and only a few instances appeared in the evidence of employees doing the acts banned by the paragraph. But the defendants [fol. 298] manifestly have no right to do the things banned

by the paragraph and the order is not void merely because it forbids others from doing what the offending employees did. The same criticism was raised to the order involved in *Wisconsin Employment Relations Board v. Milk, Etc. Union*, 238 Wis. 379, 394, 299 N. W. 31, where it is disposed of by the court saying:

"Besides, if there were only isolated instances of such threats (against customers of employer) no harm results to the union from including the ban in the judgment, as confessedly the union has no right so to threaten."

When nobody is hurt, nobody has cause to cry.

We consider that the above is sufficient to warrant sustaining the validity of the order of the Board involved under the terms of the statutes purporting to ban unfair labor practices by employees.

The union contends that if the order is in accordance with the statutes the order is unconstitutional and void so far as it forbids the employees to quit work. The first claim in this respect is that it imposes involuntary servitude contrary to the XIIIth amendment to the Constitution of the United States. The constitutional point of involuntary servitude here argued was in issue in *Western Union Tel. Co. v. International Brotherhood Elec. Workers*, 2 Fed. (2d) 993. It is said in the opinion in that case, p. 994:

"As to clause 1 of the prayer for a temporary injunction it is said that it prevents employees from ceasing to work, and therefore imposes involuntary servitude upon them. The right to cease work is no more an absolute right than is any other right protected by the Constitution. Broadly speaking, of course, one has the right to work for whom he will, to cease work when he wishes, and to be answerable to no one unless he has been guilty of a breach of contract. But the cessation of work may be an affirmative step in an unlawful plan."

When it is such a step in a concerted plan to do an unlawful act it may be enjoined. The quitting and remaining from work in the instant cases was done pursuant to a conspiracy to carry out an unlawful plan. There are many cases to the point that a conspiracy to commit a criminal act may be enjoined. It is too late to contend to the contrary in this state in view of the decision of this court in *State ex rel. Durner v. Huegin*, 110 Wis. 189, 85 N. W. 1046,

and its affirmance in *Huegin (Aikens) v. Wisconsin*, 195 U. S. 194. As said in *Dorchy v. Kansas*, 272 U. S. 306, 71 L. Ed. 248, 47 S. Ct. 86:

"To enforce payment by a strike is clearly coercion. The legislature may make such action punishable criminally . . . And it may subject to punishment him who uses the power or influence incident to his office in a union to order the strike. Neither the common law, nor the Fourteenth Amendment confers the absolute right to strike. Compare *Aikens (Huegin) v. Wisconsin*, 195 Wis. 194, 204, 205."

The opinion from which the above quotation is taken was written by Mr. Justice Brandeis. The act involved in the case was criminal by statute of Kansas but criminality is not necessary to support injunctive relief. For two or more persons to conspire to do an act to the injury of another which one person acting alone might lawfully do constitutes in this state a legal wrong. *Judevine v. Benzies-Montanye Fuel & Whlse. Co.*, 222 Wis. 512, 269 N. W. 295. If a conspiracy to do a criminal act may be enjoined so may conspiracy to do an illegal act not criminal. All that is essential to support injunctive relief is unlawfulness. Unfair labor practices are unlawful by our statutes and the Board is given the power to forbid such practices. Sec. 111.07 (4). Its power to make cease and desist orders in cases wherein they are authorized by the statute is as soundly established [fol. 300] as the power of courts to grant injunctions against criminal conspiracies. While the act involved in the instant case did not involve strikes, certainly if a court or Board may prevent strikes by injunctive or cease and desist orders, it may issue such orders to prevent the concerted action to cease work here involved. The greater quitting of work involved in strikes includes the lesser quitting here involved.

The respondents also contend that the order involved is unconstitutional because it imposes "previous restraint" upon the right of freedom of speech and freedom of assembly, both protected by the same provision of the constitution that protects freedom of the press. This contention seems to be that as freedom of the press can not be restrained, neither can one's freedom of speech be restrained by preventing him from saying what he may want in the future to say to induce employees to join the union or to join in its activities, nor can freedom of assembly be re-

strained by forbidding him in the future from attending union meetings. We do not perceive any such far-reaching effect of the order. The order bans concerted continuance of the acts involved for the unlawful purpose of interfering with production in the situation instantly involved. The union bases this claim on the holding in *Near v. Minnesota*, 283 U. S. 697, 75 L. Ed. 1357. The claim is that as *Near v. Minnesota* protects freedom of the press, it also protects freedom of assembly and freedom of speech. Doubtless it does protect the latter two to the same extent that it protects the former. In *Near v. Minnesota*, supra, the publication of a newspaper was enjoined on the ground that its publication of libelous matter constituted a public nuisance and could be abated under a Minnesota statute. Such abatement was held violative of the provision of the clause of the Con- [fol. 301] stitution of the United States protecting freedom of the press. That no previous restraint whatever may be imposed is not declared by the decision in that case. It is said, 75 L. Ed. p. 1367:

"The objection has also been made that the principle as to immunity from previous restraint is stated too broadly, if every such restraint is deemed to be prohibited. That is undoubtedly true; the protection even as to previous restraints is not absolutely unlimited . . . the primary requirements of decency may be enforced against obscene publications. The security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government. The constitutional guaranty of free speech does not 'protect' a man from an injunction against uttering words that may have all the effect of force.' *Gompers v. Buck's Stove & Range Co.*, 221 U. S. 418, 55 L. Ed. 797, 805, 34 L. R. A. (NS) 874, 31 S. Ct., 492."

It does not follow that speech can not be restrained unless the restraint is irreconcilable with the free speech declaration of *Thornhill v. State of Alabama*, 310 U. S. 87, 88, 84 L. Ed. 1093, 60 S. Ct. 737. It is stated in the opinion in the *Thornhill Case*, 84 L. Ed. p. 1103:

"It is true that the rights of employers and employees to conduct their economic affairs and compete with others for a share in the products of industry are subject to modifica-

tions or qualifications in the interests of the society in which they exist."

We consider that such restraint of speech and assembly as are here involved are within this concession.

It is also urged by the respondents that the order of the Board violates the commerce clause of the United States Constitution. This point was decided against them in *Wisconsin Employment Relations Board v. Rueping Leather Co.*, 228 Wis. 483, 279 N. W. 673. That decision was made under a preceding state employment relations act but the decision and the reason of it apply with equal force to the instant act.

The respondents cite *Hill v. Florida*, 325 U. S. 538, 89 L. Ed. 1782, as somehow contrary to our decision in the *Rueping Case*. We do not perceive that it is. The question [fol. 302] involved in that case was whether the Florida state law interfered with the right to collective bargaining granted by the National Labor Relations Act. Collective bargaining is not involved in this case. Concededly the union is the bargaining agent of the employees, certified by the National Labor Relations Board; and collective bargaining between the union and the employers was going on during the walkouts. *Alabama State Fed. of Labor v. McAdory*, 352 U. S. 450, 89 L. Ed. 1725, is also cited as contrary to the *Rueping Case*. That decision considers whether the decision of the state court in a declaratory judgment case declaring a state law regulating labor disputes constitutional would be entertained by the Supreme Court of the United States and decided that it would not. Every rule laid down in a decision of the United States Supreme Court as we understand it is to be limited as applying only to the particular facts on which it is based, and no case of that court is called to our attention that involves a situation like that involved herein. More nearly reaching the point here under consideration, perhaps, is the *Bethlehem Steel Case*, the decision of which was not handed down until April 7th last, after the briefs were prepared, and not called to our attention when the case was argued before us on April 11th. But here as in the *Florida Case*, supra, the point involved was whether the right of collective bargaining secured by the Federal Act was limited by the state act involved. Here as above stated collective bargaining is not in-

volved but is conceded to be in operation under the terms of the Federal Act. The point at issue in the *Bethlehem Steel Co. Case*, supra, was as we understand the decision, whether the State Labor Relations Board could under a state act on [fol. 303] petition of foremen in an industrial plant authorize formation of a unit for furthering their mutual interests and for collective bargaining which the National Labor Relations Board under a Federal Act had declined to authorize. The Federal Act placed in the National Labor Relations Board the power to determine whether the employees could form such a unit. Administration of the Federal Act was vested in the National Labor Relations Board. Administration of the state act was in the State Labor Board. Foremen, claiming the right as employees, applied to the National Labor Relations Board to form a unit for collective bargaining. The National Labor Relations Board declined to grant the application. The foremen then applied to the State Board to form a unit for such purpose under the state act. This the Board proceeded to do. Its action was upheld by the Court of Appeals and the decision of the Court of Appeals was reversed by the Supreme Court of the United States.

The dissenting opinion filed in the Supreme Court of the United States in the *Bethlehem Steel Co.* case took the position that the power delegated to the National Labor Relations Board to form the unit applied for was dormant because the National Labor Relations Board had not exercised it and because the National Labor Relations Board had not exercised the power the State Board had jurisdiction to exercise it. The opinion of the court was that the National Labor Relations Board—

“ . . . made clear that its refusal to designate foremen's bargaining units was a determination and an exercise of its discretion to determine that such units were not appropriate for bargaining purposes. (Citing cases). We therefore can not deal with this case as a case where Federal power has been delegated but lies dormant and unexercised” . . .

[fol. 304] and the court held that the State Board was without jurisdiction. What the court held was that the National Labor Relations Board had exercised the jurisdiction delegated to it under the Federal Act by declining to designate the foremen as a bargaining unit. The declina-

tion was an exercise of its jurisdiction, just as much as granting it would have been. The jurisdiction vested in the National Labor Relations Board was to determine whether it would designate the foremen as a bargaining unit, and it exercised jurisdiction when it denied the application.

No such situation exists in the instant case as was involved in the *Bethlehem Steel Co. Case*, supra. In the first place no application has been made to the National Labor Relations Board to exercise any jurisdiction of the labor dispute here involved. The National Labor Relations Board not having exercised any jurisdiction of such labor dispute the State Board may exercise jurisdiction of it. No conflict is here involved. There was a direct conflict in the *Bethlehem Steel Co. Case*, supra. The National Labor Relations Board had determined that foremen could not form a unit for collective bargaining and the State Board said that they could and formed such a unit. The National Labor Relations Board's decision barred the State Board from taking any action at all.

In the second place the Wisconsin Employment Relations Board and the state's "Employment Peace Act" deal with unfair labor practices of employees, a subject not touched by the National Labor Relations Act. Therefore, the Wisconsin Employment Relations Board, in dealing with unfair labor practices of employees, deals with a subject not touched by the National Labor Relations Act or within the [fol. 305] jurisdiction of the National Labor Relations Board. There is therefore no conflict between the two acts and can be none between the two boards, as to the matter instantly involved. It follows that under the rule of the *Rueping Case*, supra, the Wisconsin Board had jurisdiction in the instant case. In this all the Justices of the Supreme Court of the United States seem to agree.

Respondents seem to argue that sec. 7 of the National Labor Relations Act by providing that "employees shall have the right to self-organization . . . and to engage in concerted activities for the purpose of collective bargaining or other mutual aid and protection," gives to employees the right to engage in the "concerted activities" here involved. Not so. That section does not authorize employees to use concerted activities which are in violation of law. The activities which they are authorized to use in concert are those which are lawful. The activities employed by the

respondents in this case were activities which are unlawful under the law of Wisconsin. That only "concerted activities" to secure a lawful objective are protected is held in *Wisconsin Employment Relations Board v. Milk & Etc. Ass'n*, supra, in which certiorari was denied by the Supreme Court of the United States, 316 U. S. 668, and in *Retail Clerk's Union v. Wisconsin E. R. B.*, 242 Wis. 21, 6 N. W. (2d) 698. The same is in effect held in *Allen-Bradley Local v. Wisconsin E. R. B.*, 315 U. S. 740, 86 L. Ed. 1154.

If this is not true how are the states to police the activities of employees as well as employers? If the public interest is to be served there must be co-operation between Federal and state governments or the Federal government [fol. 306] must take over the preservation of peace and good order if it is to effectively protect interstate commerce.

Our so-called "Employment Peace Act" was enacted May 2, 1939, by Ch. 57, Laws of that year. It has now been in operation for eight years. So far as we can judge from its doings that have come before us for review it has been administered with reasonable success towards furthering the purpose of the act declared by sec. 111.01 (4):

" . . . in order to preserve and promote the interests of the public, the employee and the employer alike, to establish standards of fair conduct in employment relations and to provide a convenient, expeditious and impartial tribunal by which these interests may have their respective rights and obligations adjudicated."

Particularly has the Board proved for Wisconsin residents and citizens a comparatively "convenient," "expeditious" and inexpensive tribunal for adjudication of their rights respecting labor practices. If, whenever, a minute part of the product of a manufacturer gets into interstate commerce, because there is a federal statute dealing with labor practices of the employers but not dealing with labor practices of employees the commerce clause of the United States Constitution nullifies a state act dealing with labor practices of the employees that do not violate any provision of the Federal Act, then indeed little is left of the sovereignty of the states heretofore supposed to remain with them under Amendments IX and X of the United States Constitution. We do not mean to suggest that only a minute part of the product of the instant corporation entered into the interstate-commerce. But if the contention of the respondents

on the ground now under consideration is upheld, then every order of the Board based on violation of unfair labor practices of employees may be ignored and there will be nothing left that the Board can effectively do, as some products of every manufacturer inevitably reach interstate commerce. We are not yet ready to believe that the Congress of the United States, the National Labor Relations Board or the Supreme Court of the United States, ever intent to deny, or ever considered that it did deny, power to the state legislature or to the Wisconsin Employment Relations Board the powers exercised by them appearing in the instant case. But however that may be, if the Wisconsin Employment Relations Board is to be in effect abolished by the judgment of a court that judgment will have to be rendered by the Supreme Court of the United States.

We consider that the above is sufficient to support the validity of the order of the Board here involved and to require reversal of the judgment of the circuit court with direction to enter judgments sustaining the orders and for enforcement of them.

By the Court.—The judgment of the circuit court is reversed in each case and the causes are remanded with directions to enter judgments in accordance with this opinion.

[fol. 308] And afterwards to-wit on the 1st day of July, A. D. 1947, the following dissenting opinion by Justice Wickheim was filed in words and figures following, that is to say:

[fol. 309] IN SUPREME COURT, STATE OF WISCONSIN, AUGUST
TERM

Nos. 146—147

No. 146

INTERNATIONAL UNION, U. A. W. A., A. F. OF L., LOCAL 232,
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No. 147

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INTERNATIONAL UNION, U. A. W. A., A. F. OF L., LOCAL 232,
et al., Respondents

WICKHEM, J., dissenting:

I agree with the conclusion of the majority that the activities in which the union engaged were not a strike because they did not involve cessation of work until such time as the demands of the union were met or the tactic had failed. I further agree for whatever importance it may have that there was no strike vote in satisfaction of the requirements of sec. 111.06(2) (e) which provides as follows:

“(2) It shall be an unfair labor practice . . .

(e) To co-operate in engaging in, promoting or inducing picketing (not constituting an exercise of constitutionally guaranteed free speech) boycotting or any other overt concomitant of a strike unless a majority in a collective bargaining unit of the employes of an employer against whom such acts are primarily directed have voted by secret ballot to call a strike.”

There was no disclosure to the men that the discretion to call meetings was considered or intended to constitute a strike and, indeed, it was the view of the officers at that time [fol. 310] that such conduct would not constitute a strike. I think, however, that the section itself is of no materiality

because it conditions the concomitants of a strike whereas here we deal with the question whether there was a strike. The only limitation upon the right to strike is that sec. 111.11 requires ten-day notice of intention to strike where perishable commodities are involved.

My disagreement is with the construction of sec. 111.06 (2) (h) which makes it an unfair labor practice to take unauthorized possession of the property of an employer or to engage in any concerted effort and interfere with production except by leaving the premises in an orderly fashion for the purpose of going on a strike. I concede that the literal language of the section offers some difficulties but it appears to me that the section is intended to deal solely with acts done upon the premises of the employer. Any other construction makes the prohibition of this section broader than the legislature can reasonably be supposed to have intended to make it. For instance, a concerted and permanent quitting of employment which certainly is not a strike, is prohibited upon this construction. Even a strike initiated by means other than leaving the premises for that very purpose would seem to fall within the condemnation of the section literally construed. So also would every conceivable interference with production, whether by acts on the premises or not. Upon this point it is significant that sections adjacent to sec. 111.06 (2) (h) deal specifically with picketing, boycotting, hindering or preventing the prosecution of employment, obstructing the entrance to or egress from place of employment, interference with the use of roads, engaging in secondary boycott, sabotage, preventing the obtaining, use or disposition of materials and other concerted efforts to interfere with production. From this it is a fair conclusion that the scope of sec. 111.06 (2) (h) is much narrower than that ascribed to it by the majority opinion. It was intended to characterize as an unfair labor practice any acts done upon the premises of the employer and tending to interfere with production [fol. 311] except that of leaving the premises in an orderly fashion. The fact that the exception is cast in terms of "leaving the premises" fortifies the conclusion that the operative portion of the section deals only with acts done upon the premises. The words in the section "for the purpose of going on strike" offer some difficulty but I think the purpose was to make a sharp distinction between the sit down which was popularly called a strike and the

sort of activity protected by the act. What the legislature meant was that a strike must be conducted off the premises. Any other construction offers what appears to me as insurmountable difficulties in the instant case. Part of the union's scheme here consisted of refraining from reporting at work and did not, of course, involve even going upon the premises. In order to deal with these facts under the majority view we must take the position either (1) that concerted failure to report for work is a violation of the section; or (2) that it is so closely related in effect and purpose to leaving the premises that it should be included within the prohibition of the section or (3) that the scheme of the union must be considered in its entirety and not in separate parts and that failure to report must be considered as an inseparable item of a single unfair labor practice. Any of these views, no matter how plausibly put, in my opinion amounts to a judicial extension of the scope of the section. The labor peace act was passed at a time when sitdown strikes and slowdowns were in vogue and it appears to me that the legislature meant specifically to deal with them and with all other acts done upon the premises of the employer in section 111.06 (2) (h), leaving to other sections the definition of other unfair practices amounting to concerted interferences with production. It is clear enough that the scheme involved in the present case was an invasion of the employer's rights of management and control. Such a scheme, however, had never been tried or thought of by unions and evidently was not in the minds of the legislature and perhaps for this reason was not designated an unfair labor practice. In any case, however, I think the section [fol. 312] cannot without judicial legislation be broadened to include this as an unfair labor practice.

It has been suggested that sec. 111.06 (3) has some bearing upon the case. This section provides:

"It shall be an unfair labor practice for any person to do or cause to be done on behalf of or in the interest of employers or employees, or in connection with or to influence the outcome of any controversy as to employment relations any act prohibited by sub-sections (1) and (2) of this section."

I am of the view that this section has no application to the present case. It simply imposes upon associations of employers outside unions and other individuals the same

duties with respect to fair labor practices as are imposed by subsections (1) and (2) upon those having the relation of employer and employee. In any case the section requires that before an unfair labor practice can be found the persons referred to do some act specifically prohibited by subsections (1) and (2). That brings us back to our original question and offers no answer that can be of any use in this case.

Since the activity was not a strike I conclude that it is not a protected union activity. It was a breach of shop discipline and an invasion of the employer's rights for which the employer may visit upon the participants the penalty of discharge or lesser disciplines without committing an unfair labor practice under the act.

There is one further matter. It is said that paragraph (a) of the board's order goes no further than to prohibit the holding of union meetings for the purpose of interfering with production. The order requires the employees to cease and desist from interfering with production "by arbitrarily calling union meetings, inducing work stoppage during regular scheduled working hours; or *engaging in any other concerted effort to interfere with production of the complainant except by leaving the premises in an orderly manner for the purpose of going on strike.*" The italicized [fol. 313] portion of the order is in addition to the portion which deals with the matter of union meetings. As to just what it may prohibit is open to question. It is as broad as the statute itself and appears to me to be more extensive than the acts charged in this case. It seems to me that it should be deleted.

I am authorized to state that Mr. Chief Justice Rosenberry and Mr. Justice Rector concur in this opinion.

[fol. 314] And afterwards to-wit on the 21st day of June, A. D. 1947, the following motion for rehearing was filed by respondents, in words and figures following, that is to say:

[fol. 315] STATE OF WISCONSIN IN SUPREME COURT, AUGUST TERM, 1946

No. 146

INTERNATIONAL UNION, U. A. W. A., A. F. OF L., LOCAL 232;
Anthony Doria, Clifford Matchey, Walter Berger, Erwin
Fleischer, John M. Corbett, Oliver Dostaler, Clarence
Ehrman, Herbert Jacobsen, Louis Lass, Respondents,

VS.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING,
Henry Rule and J. E. Fitzgerald, as Members of the Wis-
consin Employment Relations Board; and Briggs & Strat-
ton Corporation, a Corporation, Appellants

No. 147

WISCONSIN EMPLOYMENT RELATIONS BOARD, Appellant,

VS.

INTERNATIONAL UNION, U. A. W. A., A. F. OF L., LOCAL 232;
Anthony Doria, Clifford Matchey, Walter Berger, Erwin
Fleischer, John M. Corbett, Oliver Dostaler, Clarence
Ehrman, Herbert Jacobsen, Louis Lass, Respondents,

MOTION FOR REHEARING

Now come the Respondents, International Union, United Automobile Workers of America, Local 232, et al., and respectfully move this Honorable Court to grant a rehearing in the above entitled cases, on the grounds and for the reasons to be assigned in the printed brief which will be filed in support hereof.

Dated at Milwaukee, Wisconsin, this 19th day of June, A. D. 1947.

Padway, Goldberg & Previant, Attorneys for Re-
spondents.

[fol. 316] And afterwards to-wit on the 21st day of June, A. D. 1947, an order was entered in this Court retaining the record in this cause until the final determination of said motion, in words and figures following, that is to say:

MILWAUKEE CIRCUIT COURT

INTERNATIONAL UNION, U. A. W. A., A. F. OF L., LOCAL 232,
et al., Respondents

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, et al., Appellants

WISCONSIN EMPLOYMENT RELATIONS BOARD, Appellant,

vs.

INTERNATIONAL UNION, U. A. W. A., A. F. OF L., LOCAL 232,
et al., Respondents

The said respondents having moved for a rehearing in these causes, it is now here ordered that the records be retained in this Court, until the final determination of said motions.

[fol. 317] And afterwards to-wit on the 9th day of September, A. D. 1947, the same being the 3rd day of said term, the motions were denied in words and figures following, that is to say:

MILWAUKEE CIRCUIT COURT

INTERNATIONAL UNION, U. A. W. A., A. F. OF L., LOCAL 232,
et al., Respondents

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, et al., Appellants

WISCONSIN EMPLOYMENT RELATIONS BOARD, Appellant,

vs.

INTERNATIONAL UNION, U. A. W. A., A. F. OF L., LOCAL 232,
et al., Respondents

The Court being now sufficiently advised of and concerning the motions of the said respondents for a rehearing in these causes, it is now here ordered that said motions, be, and the same are hereby, denied without costs.

[fol. 318] STATE OF WISCONSIN IN SUPREME COURT

INTERNATIONAL UNION, U. A. W. A., A. F. OF L., LOCAL 232,
et al., Respondents;

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, et al., Appellants

WISCONSIN EMPLOYMENT RELATIONS BOARD, Appellant,

vs.

INTERNATIONAL UNION, U. A. W. A., A. F. OF L., LOCAL 232,
et al., Respondents

I, Arthur A. McLeod, Clerk of the Supreme Court of the State of Wisconsin, do hereby certify that the above and foregoing is a true and correct transcript of all the record and proceedings now on file and of record in my office with all things concerning the same in the above entitled causes, in this Court.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at Madison, this 26th day of January, A. D. 1948.

Arthur A. McLeod, Clerk of Supreme Court, Wisconsin. (Seal.)

[fol. 319] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1947

No. —

INTERNATIONAL UNION, U. A. W. A., A. F. of A., LOCAL 232;
Anthony Doria, Clifford Matchey, Walter Berger, Erwin
Fleischer, John M. Corbett, Oliver Postaler, Clarence
Ehrman, Herbert Jacobsen, Louis Lass, Petitioners,

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING,
Henry Rule and J. E. Fitzgibbon, as Members of the Wis-
consin Employment Relations Board; and Briggs & Strat-
ton Corporation, a Corporation

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF
CERTIORARI

Upon Consideration of the application of counsel for
petitioner(s),

It Is Ordered that the time for filing petition for writ of
certiorari in the above-entitled cause be, and the same is
hereby, extended to and including February 7, 1948.

Frank Murphy, Associate Justice of the Supreme
Court of the United States.

Dated this 3rd day of December, 1947.

(4725)

[fol. 306] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1947

No. 580

ORDER ALLOWING CERTIORARI—Filed March 15, 1948

The petition herein for a writ of certiorari to the Supreme Court of the State of Wisconsin is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 307] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1947

No. 581

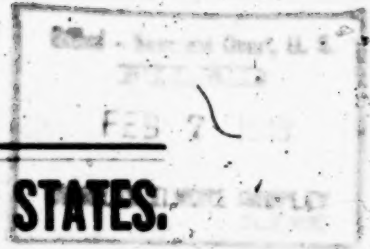
ORDER ALLOWING CERTIORARI—Filed March 15, 1948

The petition herein for a writ of certiorari to the Supreme Court of the State of Wisconsin is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(6593)

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SUPREME COURT, U.S.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1947.

No. 580-581

INTERNATIONAL UNION, U. A. W. A., A. F. of L., LOCAL
232; ANTHONY DORIA, CLIFFORD MATCHEY, WALTER
BERGER, ERWIN FLEISCHER, JOHN M. CORBETT,
OLIVER DOSTALER, CLARENCE EHLMANN,
HERBERT JACOBSEN, LOUIS LASS,
Petitioners,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E.
GOODING, HENRY RULE and J. E. FITZGIBBON,
as Members of the Wisconsin Employment Rela-
tions Board; and BRIGGS & STRATTON
CORPORATION, a Corporation,
Respondents.

PETITION FOR WRIT OF CERTIORARI To the Supreme Court of the State of Wisconsin and BRIEF IN SUPPORT THEREOF.

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HERBERT S. THATCHER and
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INDEX.

	Page
Subject Index.	
Petition for writ of certiorari.....	1-11
Summary statement of matter involved.....	2
Statement as to jurisdiction.....	6
Question presented.....	10
Reasons relied on for allowance of the writ.....	10
Prayer for writ.....	11
Brief in support of petition for writ of certiorari....	13-43
The opinion of the court below.....	13
Jurisdiction	13
Statement of the case.....	15
Specification of errors.....	15
Argument	16
I. The statutes, and the order and judgment of the Supreme Court based thereon, are unconstitutional under the Commerce Clause of the United States Constitution	16
A. The statutes, order and judgment deprive pe- titioners of rights secured by Paragraph 7 of the National Labor Relations Act.....	17
B. The statutes, order of the Board, and judg- ment of the Court also violate Section 13 of the National Labor Relations Act.....	20
Work stoppages engaged in for short periods of time at intermittent and irregular intervals are "strikes".....	21
a. There was an act of quitting.....	21
b. The quitting was done by mutual under- standing	24

c. By a body of workmen.....	24
d. The purpose of the action was to enforce compliance with demands made on the employer	24
The activities conform to other definitions of strikes	24
C. The scope of the order and judgment may not conflict with the rights conferred by the federal law.....	28
II. A state cannot compel employees engaged in a labor dispute with their employer to perform work, nor can it enjoin peaceful assembly in light of the Thirteenth and Fourteenth Amendments to the Constitution.....	29
A. The order, judgment, and any statute upon which they may be based, violate the Thirteenth Amendment.....	31
B. The direction for judgment, order and statute, upon which they may be based, violate the Fourteenth Amendment to the United States Constitution	36
III. Significance and effect of the injunction and statute as interpreted by the Wisconsin Supreme Court, if permitted to stand.....	39
Conclusion	42
Appendix A—Wisconsin Statutes.....	45
Sec. 111.04.....	45
Sec. 111.06.....	45
Sec. 111.15.....	45

Table of Cases Cited.

Aikens v. Wisconsin, 195 U. S. 1945	34
Alabama State Federation of Labor v. McAdory, 246 Ala. 1	32
Alabama State Federation of Labor v. McAdory, 325 U. S. 450	28
Allen Bradley Local No. 1111 et al. v. Wisconsin Employment Relations Board, 315 U. S. 740, 62 S. Ct. 820	9, 10, 18
American Federation of Labor v. Swing, 312 U. S. 321	35
American Steel Foundries v. Tri-City Central Trade Council, 257 U. S. 184	33
Arthur v. Oaks, 63 Fed. 310	26
Bakery and Pastry Drivers, etc., v. Wohl, 315 U. S. 769	38
Bedford Cut Stone Company v. Journeymen Stone Cutters Association of North America, 274 U. S. 37	31
Carpenters Union v. Citizens Committee, 333 Ill. 225, 164 N. E. 393	32
Carter Carburetor Corp. v. N. L. R. B., 140 Fed. (2d) 14	18, 19
DeJonge v. State of Oregon, 299 U. S. 353, 81 L. Ed. 278	37
Dorchy v. Kansas, 272 U. S. 306	34
Ex Parte Blaney, 184 Pac. (2d) 892	33
Great Northern Railway Company v. Brousseau, 286 Fed. 414	32, 33
Greenwood v. Hotel and Restaurant Employees, 30 So. (2d) 696	33
Hague v. Committee of Industrial Organization, 307 U. S. 496, 83 L. Ed. 1423	37
Henderson v. Coleman, 150 Fla. 185, 7 So. (2d) 117	32

Herndon v. Lowry, 301 U. S. 242.....	37
Hill v. Florida, 325 U. S. 538, 65 S. Ct. 1373.....	9, 10, 28
In Re: Porterfield, 147 Pac. (2d) 15 (Calif.).....	33
Lindsay v. Montana State Federation of Labor, Mont. 264, 96 Pac. 127.....	37 32
National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1.....	19, 35
National Labor Relations Board v. Pennsylvania Grey- hound Lines, Inc., 303 U. S. 261.....	19
Near v. Minnesota, 283 U. S. 697, 75 L. Ed. 1357.....	9, 10, 38
Pollock v. Williams, 322 U. S. 4.....	31
Stapleton v. Mitchell, 60 Fed. Sup. 51.....	32
Thomas v. Collins, 323 U. S. 516, 65 S. Ct. 315.....	9, 10, 36
Thornhill v. Alabama, 310 U. S. 88, 60 S. Ct. 736.....	9, 10, 38
United States v. Hutcheson, 312 U. S. 219, 62 S. Ct. 463	9, 10, 31

Statutes Cited.

Act of Congress, Feb. 13, 1925, Judicial Code, Sec. 237-b, 28 U. S. C. A., Sec. 344-b.....	6, 13
Constitution of the United States:	
Art. I, Sec. 8	10, 29
Art. VI	10
Thirteenth and Fourteenth Amendments.....	10
Labor Management Relations Act of 1947.....	25, 26
National Labor Relations Act.....	16, 17, 20
Wisconsin Statutes:	
Sec. 111.04	45
Sec. 111.06 (2) (e) (h).....	45
Sec. 111.15	45

Other Citations.

Webster's International Dictionary, Second Ed., Un- abridged, 1944, definition of "strike".....	21
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1947.

No.

**INTERNATIONAL UNION, U. A. W. A., A. F. of L., LOCAL
232; ANTHONY DORIA, CLIFFORD MATCHEY, WALTER
BERGER, ERWIN FLEISCHER, JOHN M. CORBETT,
OLIVER DOSTALER, CLARENCE EHLMANN,
HERBERT JACOBSEN, LOUIS LASS,**
Petitioners,

vs.

**WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E.
GOODING, HENRY RULE and J. E. FITZGIBBON,
as Members of the Wisconsin Employment Rela-
tions Board; and BRIGGS & STRATTON
CORPORATION, a Corporation,**
Respondents.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Justices of the Supreme Court of
the United States:

The above named Petitioners respectfully petition for
a Writ of Certiorari to review the decision of the Supreme
Court of Wisconsin, 250 Wis. 550, rendered June 10, 1947,
Motion for Rehearing denied September 9, 1947, reversing
a judgment of the Circuit Court of Milwaukee County,
Wisconsin, with directions to enter judgments sustaining
the order of the Wisconsin Employment Relations Board,
enjoining and restraining your Petitioners from engaging
in certain activities, and for enforcement of said order.
(The decision of the Wisconsin Supreme Court may be
found at pages 287-307 of the Record.)

SUMMARY STATEMENT OF MATTER INVOLVED.

[The Record in the court below was printed in narrative form as an Appendix. This Appendix has been filed herein in lieu of the original record under Rule 38 (7) of this court. References to the Record (R.) are references to the pages of that Appendix, except as to the proceedings in the State Supreme Court, in which case Record references are to the supplemental Record printed by the Clerk of this Court.]

This case involves the right of employees to withhold their services for periods of one day or less, and at irregular intervals of time, in furtherance of collective bargaining demands, and in the absence of a union contract.

The Briggs & Stratton Corporation (hereinafter referred to as the "Company" or the "Employer") operates two manufacturing plants in Milwaukee and engages the services of approximately 2000 employees for hire in the State of Wisconsin (R. 154). The International Union, U. A. W. A., A. F. of L., Local 232 (hereinafter called the "Union"), represents the production workers of the company as their collective bargaining agent having been duly certified by the National Labor Relations Board under the provisions of the National Labor Relations Act, as the collective bargaining representative in March, 1938 (R. 155-158).

Since the certification the Company and the Union entered into various collective bargaining agreements, the last of which expired on July 1, 1944 (R. 212). Due to the inability of the parties to agree upon the terms of a new agreement in June, 1944, the dispute was submitted to the National War Labor Board operating under authority of the War Labor Disputes Act of 1943 and Ex-

Executive Order No. 9017. The National War Labor Board entered its Directive on December 20, 1945. This order was received by the Union on or about December 21, 1945, and by the Company on or about January 17, 1946 (R. 155-156). From the time of the entry of the Directive Order of the National War Labor Board until hearing before the Wisconsin Employment Relations Board in the present proceedings, the Company made no effort to comply with any of the terms of such order, although the Union sought to induce the Company to do so (R. 171).

After V-J Day, August 15, 1945, the Union raised new demands relating primarily to wages (R. 157).

On November 3, 1945, at a special meeting, after discussion of the apparent stalemate of the negotiations between the Union and the Company, a motion was unanimously passed empowering the Executive Board of the Union to call a special meeting during working hours at any time as such Board saw fit (R. 179). The membership is the highest authority of the Union, and it is the duty of the officers to carry out the directions and desires of the members (R. 174). It was agreed at such meeting that such stoppages would be so handled so as not to create any spoilage of material or damages.

Subsequently, a number of such stoppages for the purpose of attending union meetings were called from time to time. The first one occurred on November 6, 1945 (R. 158). No advance notice was given to the Company prior to such stoppages. Stoppages occurred usually during the first shift, which operated at the east plant from 8 A. M. to 5 P. M., and at the west plant from 7 A. M. to 3:30 P. M. The employees would leave some time during the first shift (sometimes as early as 8:30 A. M., or at late as 1:30 P. M.) and would not return that day, but would report back to work the following day for the regularly scheduled

shift. The employees on the second shift, with working hours from 3:30 P. M. to 12 Midnight at both plants, sometimes did and sometimes did not report to work on the days the employees on the first shift left. On days when they reported to work the employees on the second shift worked their full shift (R. 158-160; 181). On days when most second-shift employees did not report to work, they would report the following day ~~for their~~ regularly scheduled hours (R. 158-159). No disciplinary action was taken by the company.

On February 15th, 1946, after several stoppages, a secret ballot was taken at a special meeting of the union. This secret ballot authorized the adoption and continuance of special meetings at any time. 1174 employees voted in favor of the continuance and 7 voted in opposition (R. 209). The vote was taken for the purpose of complying with the Strike-Vote provision of Chapter 111.06 (2) (e), Wisconsin Statutes, in the event the Wisconsin Employment Relations Board should hold that to be necessary (R. 209). The company was advised during the course of negotiations, and while the stoppages were taking place, that further walkouts would take place if the demands of the union were not met (R. 166).

The work stoppages affected production, but this effect was not as great as the effect of one lengthy strike. The company admitted that these stoppages by the union were less costly to it than a full-time continuous strike would have been (R. 171).

Union officials claimed that the stoppages were for the purpose, among other things, of interfering with the production of the company so as to induce and compel the company to agree to union demands for inclusion in a collective bargaining agreement which was then in the process of negotiation (R. 181); of keeping the workers

on the payroll, except for the deductions which the company took for the brief periods of the stoppage, and, so avoid the hardship of a protracted strike (R. 177); of preventing company-inspired rumors from wrecking the solidarity of the employees (R. 181); of conveniently getting all members of the union together during the work week rather than on Sundays; and for the purpose of putting the company on the defensive in the collective bargaining process (R. 166, 177). The meetings were attended by a preponderant majority of those working (R. 181). The officials of the union never tried to name the activities, either by use of the term "strike" or otherwise (R. 176-177).

The company filed its complaint with the Wisconsin Employment Relations Board charging unfair labor practices by the union in violation of Chapter 111, Wisconsin Statutes (1945).

After a hearing the Board made findings of fact, conclusions of law, and entered an order, which insofar as is pertinent here, provided that the union and its officers cease and desist from

"(a) engaging in concerted efforts to interfere with production and arbitrarily calling union meetings and inducing work stoppages during regularly scheduled working hours or engaging in any other concerted effort to interfere with production of the complainant, except by leaving the premises in an orderly manner for the purpose of going on strike;" (R. 127).

Two separate proceedings were begun in the Circuit Court for Milwaukee County, a Petition for Review by the Union, and a Petition for Enforcement by the Board (R. 118, 137). The proceedings were consolidated by stipulation. The Circuit Court, in its opinion entered October 18, 1946, ruled that Paragraph (a) of the Board's cease

and desist order quoted above be vacated, and that the Board's Petition to enforce this portion of the order be denied (R. 115). A single judgment was entered accordingly in the Circuit Court on October 30, 1946 (R. 137). The Wisconsin Employment Relations Board and the Company appealed from that portion of the judgment vacating part of the Board's order. The Wisconsin Supreme Court reversed the judgment of the Circuit Court of Milwaukee County, and directed the Circuit Court to enter judgment enforcing the order of the Board. Motion for rehearing was denied.

STATEMENT AS TO JURISDICTION.

This case is one over which the Court has jurisdiction under the provisions of the Act of Congress of February 13, 1925, Section 237-b, 28 U. S. C. A., Section 344-b, giving jurisdiction to this Court:

“to require that there be certified to it for review and determination with the same power and authority and with like effect as if brought up by appeal any cause wherein a final judgment or decree has been rendered and passed by the highest court of a state in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any state on the ground of being repugnant to the Constitution or laws of the United States; or where any title, right, privilege or immunity is especially set up or claimed by either party under the Constitution. * * *”

In this case the validity of the Statutes of the State of Wisconsin, to-wit: Sections 111.01 through 111.19 Wisconsin Statutes 1945, particularly Sections 111.04, 111.06 (2) (c) and (h) and 111.15, and a direction to enter judgment enforcing an order which is purportedly based on such

statutes is drawn in question upon the ground that such Statutes, order and judgment on their face, and as construed in the opinion and judgment of the Supreme Court of the State of Wisconsin, are repugnant to Article I, Section 8, and Article VI of the United States Constitution, in that they are contrary to and in violation of rights conferred and duties imposed by superior federal legislation, to-wit, the National Labor Relations Act, 49 Stats. 449, 29 U. S. C., Paragraphs 151-166; Section 1 of the Thirteenth Amendment to the Constitution of the United States, in that they impose involuntary servitude, and Section 1 of the Fourteenth Amendment to the United States Constitution, in that they deprive petitioners of liberty or property without due process of law, deprive petitioners of the equal protection of the laws, and more particularly deny to the petitioners freedom of speech and assembly.

The decision of the Wisconsin Supreme Court was in favor of the validity of the Statutes and Order. The Supreme Court of the State of Wisconsin rendered its decision herein on June 10, 1947, and denied a motion for rehearing on the 9th day of September, 1947.

On December 3, 1947, Mr. Justice Murphy, by appropriate order, extended the time for filing of this Petition until the 7th day of February, 1948 (R. ...).

Said opinion of the Supreme Court of the State of Wisconsin, the last resort of all causes in the State of Wisconsin, is officially reported in 250 Wis. 550 (R. 287-307).

The Petitioners argued before the Wisconsin Employment Relations Board (R. 149-151), before the Circuit Court of Milwaukee County (R. 135-136), and before the Supreme Court of the State of Wisconsin (see Decision, R. 287-307); that Section 111.04 and Section 111.06 (2) (e) and (h) of the Wisconsin Statutes, and the Order of the Board based on the Wisconsin Statutes, as construed, were unconstitutional, void, and of no effect whatsoever be-

cause they were repugnant to Article I, Section 8, and Article VI of the United States Constitution, in that they were contrary to and in violation of the rights conferred and duties imposed by superior federal legislation; Section 1 of the Thirteenth Amendment to the Constitution of the United States, in that they imposed involuntary servitude, and Section 1 of the Fourteenth Amendment to the United States Constitution, in that they deprived petitioners of liberty and property without due process of law, deprived petitioners of the equal protection of the laws, and more particularly denied to the petitioners freedom of speech and assembly.

The Federal question of whether the Wisconsin Statutes in question and the order and judgment purportedly based on such Statutes violated the Constitution of the United States thus was raised before every tribunal before which argument was heard. The Supreme Court of the State of Wisconsin specifically held that neither the Wisconsin Statutes nor the Order based on such Statutes, as construed, deprives the Petitioners of any rights guaranteed under the provisions of the Constitution of the United States. The court said:

“The constitutional point of involuntary servitude here argued was in issue in **Western Union Telegraph Company v. International Brotherhood of Electrical Workers (D. C.)**, 2 Fed. (2d) 993 * * *. When it is (an affirmative) step in a concerted plan to do an unlawful act it may be enjoined.”

“It does not follow that speech cannot be restrained unless the restraint is irreconcilable with the free-speech declaration of **Thornhill v. Alabama**, 310 U. S. 88. * * * We consider that such restraint of speech and assembly as are here involved are within this concession.”

"It is also urged by the Respondents that the order of the Board violates the Commerce Clause of the United States Constitution, Section 8, Article I. This point was decided against them in **Wisconsin Labor Relations Board v. Rueping L. Company**, 228 Wis. 473. The decision was made under a preceding State Employment Relations Act, but the decision and the reason of it apply with equal force to the instant Act."

Thus the Wisconsin Supreme Court has taken the position that mere work stoppages in connection with a labor dispute, but not associated with any violence, boycotting, or picketing, are validly restrained by the order and judgment directed to be entered enforcing such order; that such restraints are supported by the provisions of Chapter 111, Wisconsin Statutes 1945, and that the question of the violation of constitutional guarantees alleged by the Petitioners to have been breached by the order should be determined adversely to the Petitioners.

Some of these cases relied on by Petitioners in the Courts below are:

1. **United States v. Hutcheson**, 312 U. S. 219, 62 S. Ct. 463;
2. **Thornhill v. Alabama**, 310 U. S. 88, 60 S. Ct. 736;
3. **Near v. Minnesota**, 283 U. S. 697, 75 L. Ed. 1357;
4. **Hill v. Florida**, 325 U. S. 538, 65 S. Ct. 1373;
5. **Allen Bradley Local No. 1111 et al. v. Wisconsin Employment Relations Board**, 315 U. S. 740, 62 S. Ct. 820;
6. **Thomas v. Collins**, 323 U. S. 516, 65 S. Ct. 315.

A copy of the entire record in this case as certified to be true and correct by the Clerk of the Supreme Court of the State of Wisconsin is hereby furnished and made

a part of this application in compliance with Rule 38, Paragraph 1, of the Rules of this Court.

The State Statutes involved are set forth in Appendix A, attached to this petition at page 45.

QUESTION PRESENTED.

The following Federal question raised and argued before the Supreme Court of the State of Wisconsin is also presented here:

Do an order and judgment, and any statutes upon which such order or judgment are based, violate Article I, Section 8 and Article VI, of, and the Thirteenth and Fourteenth Amendments to the Constitution of the United States, insofar as such order and judgment and the statutes restrain a labor union, its officers and members from leaving the premises of an employer or refusing to enter upon such premises for short periods of time and at irregular intervals for the purpose of interfering with production in support of collective bargaining demands?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

The direction of judgment by the Supreme Court of the State of Wisconsin is in conflict with the decisions of this Honorable Court in **United States v. Hutcheson**, 312 U. S. 219, 62 S. Ct. 463; **Thornhill v. Alabama**, 310 U. S. 88, 60 S. Ct. 736; **Near v. Minnesota**, 283 U. S. 697, 75 L. Ed. 1357; **Hill v. Florida**, 325 U. S. 538, 65 S. Ct. 1373; **Allen Bradley Local No. 1111 et al. v. Wisconsin Employment Relations Board**, 315 U. S. 740, 62 S. Ct. 820; **Thomas v. Collins**, 323 U. S. 516, 65 S. Ct. 315.

For the first time there is being presented to this Court the question of the constitutionality of state legislation, as construed by the State Supreme Court, which attempts to prevent the peaceful activity of short-time stoppages

of work as not constituting a strike, as such term is used in the State Statute, and which limits work stoppages and union assemblage to a situation in which the majority of employees in a suit have by secret ballot called a strike as such term is narrowly and inaccurately defined by that Court. And in the face of federal legislation which firmly guarantees not only the right to strike, but also to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection (National Labor Relations Act, Sections 7 and 13).

PRAYER FOR WRIT.

Wherefore, your petitioners pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Clerk of the Supreme Court of the State of Wisconsin, commanding that Court to certify and send to this Court for review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the cases numbered 146 and 147 and entitled **International Union, U. A. W. A., A. F. of L., Local 232, et al., v. Wisconsin Employment Relations Board et al., and Wisconsin Employment Relations Board v. International Union, U. A. W. A., A. F. of L., Local 232, et al.**, and that the judgment of the Supreme Court of the State of Wisconsin may be reviewed by this Honorable Court, and that your Petitioners may have such other and further relief in the premises as to this Honorable Court may seem just and meet; and your petitioners will ever pray.

**J. ALBERT WOLL,
HERBERT S. THATCHER and
ALFRED G. GOLDBERG,**

Counsel for Petitioners.

**DAVID PREVIAINT and
SAUL COOPER,**
Of Counsel.

SUPREME COURT OF THE UNITED STATES:

OCTOBER TERM, 1947.

No.

INTERNATIONAL UNION, U. A. W. A., A. F. of L., LOCAL
232; ANTHONY DORIA, CLIFFORD MATCHEY, WALTER
BERGER, ERWIN FLEISCHER, JOHN M. CORBETT,
OLIVER DOSTALER, CLARENCE EHLMANN,
HERBERT JACOBSEN, LOUIS LASS,
Petitioners,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E.
GOODING, HENRY RULE and J. E. FITZGIBBON,
as Members of the Wisconsin Employment Rela-
tions Board; and BRIGGS & STRATTON
CORPORATION, a Corporation,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

THE OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of the State of Wisconsin is reported in 250 Wis. 550 (R. 287-307):

JURISDICTION.

The statutory provision believed to sustain the jurisdiction of this Court is Title 28, U. S. C. A., Section 344-b [Judicial Code, Section 237 (b), as amended by the Act of February 13, 1925].

As seen in the jurisdictional statement in the foregoing petition, the constitutional objections to the legislation upon which the order and judgment forbidding the calling of union meetings and work stoppages are based, were raised and argued before every tribunal, including the Wisconsin Employment Relations Board, the Circuit Court of Milwaukee County, and the Supreme Court of the State of Wisconsin, the court of last resort for all causes in the state. The constitutional objections were discussed and passed upon by the Supreme Court of the State of Wisconsin, which court determined that such objections were not available to Petitioners, and that the legislation and the judgment did not invade any constitutional rights.

STATEMENT OF THE CASE.

A summary statement of the case appears in the Petition for Writ of Certiorari, which, in the interest of brevity, is incorporated herein by reference.

SPECIFICATION OF ERRORS.

The Supreme Court of the State of Wisconsin erred in the following respects:

In reversing the judgment of the Circuit Court for Milwaukee County, Wisconsin, which judgment vacated part of the order of the Wisconsin Employment Relations Board, and in directing entry of judgment and enforcing the entire order, which, as construed by the Wisconsin Supreme Court, prohibited the Petitioners from engaging in peaceful work stoppages and attending union meetings, during the course of a labor dispute arising out of collective bargaining negotiations.

ARGUMENT.

I.

THE STATUTES, AND THE ORDER AND JUDGMENT OF THE SUPREME COURT BASED THEREON, ARE UNCONSTITUTIONAL UNDER THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

It has been claimed by the Petitioners throughout the proceedings that the order is a limitation upon the federal right to engage in concerted activities for the purpose of collective bargaining, or other mutual aid or protection, as prescribed in the Act of July 5, 1935, c. 372, 49 Stats. 449, 29 U. S. C., Paragraphs 151-166, known as the National Labor Relations Act, and is therefore in violation of Article I, Section 8, and Article VI of the United States Constitution. That Petitioners are within the class of employees whose activities are protected by the National Act is undisputed inasmuch as the National Labor Relations Board previously assumed jurisdiction of the employment relations herein involved, and certified the petitioning union as the duly selected collective bargaining agent. And that the order and judgment herein entered affects employees as members of the union is demonstrated by the Wisconsin Supreme Court decision wherein it is stated that the order

“* * * operates on the individual members of the union as well as upon the union's officers, although the individual members are not named as defendants. The union is only an association of its members, and whatever is forbidden to the union is forbidden to its members.”

A.

The Statutes, Order and Judgment Deprive Petitioners of Rights Secured by Paragraph 7 of the National Labor Relations Act

The order of the Board, and the direction of enforcement by the Wisconsin Supreme Court, violate the rights of the Petitioners, as set forth in Paragraph 7 of the National Labor Relations Act, which provides:

“Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.” (Emphasis ours.)

It is undisputed in the record that the concerted activities engaged in by the employees was “for the purpose of collective bargaining, or other mutual aid or protection.” The Wisconsin Employment Relations Board did not and could not find to the contrary. It specifically found in Finding of Fact No. 8 that the activities were to “induce and compel the complainant to accede to the demands of the union to be included in the collective bargaining agreement being negotiated between the parties” (R. 124-125). And the Supreme Court of Wisconsin affirmed such finding, both by express reference, and in the following language:

“The action of the employees was a concerted effort to, and did, interfere with production and was taken as economic pressure to compel the company to comply with the union’s demands respecting the terms of the contract being negotiated.”

Its judgment enforcing the order of the Board therefore is in flat derogation of the above enumerated rights found in the National Labor Relations Act.

The claim of conflict and inconsistency between judgments of the Wisconsin Court and the National Labor Relations Act has been made before to this court. Here, however, there is a flat inconsistency, and therefore the decision of this court in the case of **Allen Bradley Local No. 1111 et al. v. Wisconsin Employment Relations Board et al.**, 315 U. S. 740, is directly pertinent insofar as the instant case lies within that realm which the court said the **Allen Bradley Case** did not embrace. In the **Allen Bradley Case** this court, in rejecting the appeal of the union, pointed out that the order about which the union complained was an order which merely prohibited mass picketing, threats and violence, and that the action of the Board neither

“impairs, dilutes, qualifies or in any respect subtracts from any of the rights guaranteed and protected by the Federal Act.”

And the court further stated:

“It has not been shown that any employee was deprived of rights protected or granted by the Federal Act or that the status of any of them under the Federal Act was impaired.”

In the instant case, however, there is a deprivation of rights protected or granted by the Federal Act, namely, the above quoted right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

That the action of the State Supreme Court in this case is a deprivation of rights protected or granted by the Federal Act is illustrated by the holdings in the following cases that the mutual aid and concerted activities protected by the Act include the right to strike or quit.

It was held in **Carter Carburetor Corp. v. N. L. R. B.**, 140 Fed. (2d) 14, that:

"Section 7 (of the National Labor Relations Act) gives employees the right 'to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.' This 'mutual aid' and 'concerted activities' include, we think, the right to join other workers in quitting work in protest over the treatment of a co-employee, or supporting him in any other grievance connected with his work or his employer's conduct (citing cases)."

In the case of **National Labor Relations Board v. Jones and Laughlin Steel Corp.**, 301 U. S. 1, sustaining the constitutionality of the National Labor Relations Act, this court stated:

"Fully recognizing the legality of collective action on the part of employees in order to safeguard their proper interests, we said that Congress was not required to ignore this right, but could safeguard it."

Similarly, in **National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc.**, 303 U. S. 261, this Court stated:

"The history of the act and its language show that its ruling purpose was to protect interstate commerce by securing to employees the rights established by Paragraph 7 to organize, bargain collectively through representatives of their own choosing, and to engage in concerted activities for that and other purposes. **National Labor Relations Board v. Jones and Laughlin Steel Corp.**, 301 U. S. 1, 23, 33. This appears both from the formal declaration of the policy in Paragraph 1 of the Act, **N. L. R. B. v. Jones and Laughlin, S. Ct.**, supra, 22-24, and from Paragraph 7, in its declaration of the policy which, in conjunction with Paragraph 10, Section c, it adopts as the controlling guide to administrative action."

This judgment of the State Supreme Court is not in conformity with the rights of the Petitioners, as established by Section 7 of the National Labor Relations Act. In conforming, it should yield to the greater superior authority of the federal law.

B.

The Statutes, Order of the Board, and Judgment of the Court Also Violate Section 13 of the National Labor Relations Act.

The provisions of Section 13 of the Wagner Act, as they were in effect at the time of the proceedings herein involved, were as follows:

“Section 13. Nothing in this act shall be construed so as to interfere with, impede, or diminish in any way the right to strike.”

If in fact the activities engaged in by the Petitioners were strike activities, the injunctive action taken by the State of Wisconsin then violates Section 13 of the National Labor Relations Act; and since Congress has vested in the National Labor Relations Board jurisdiction of the labor relations of employers in interstate commerce, and has dealt specifically with the right to strike, and other concerted activities, the State is impotent to act in any manner inconsistent with the National Law and Policy. Since by Section 13, Congress has declared that the right to strike shall not be interfered with, impeded, or diminished, the State Order or judgment which does impede a strike is null and void as conflicting with the Federal Act.

Work Stoppages Engaged in for Short Periods of Time at Intermittent and Irregular Intervals Are "Strikes,"

The stoppages involved in the instant case are "strikes" despite the fact that the Petitioners in the proceedings below did not name them as such,¹ and despite the fact that the Supreme Court of the State of Wisconsin did not construe these stoppages as coming within its own definition.

The Wisconsin Supreme Court of course has said that these activities are not strikes, and we assume that it will be urged in this court that since they are not strikes as defined by Wisconsin law, there can be no valid argument made on the right to strike.

But Wisconsin may not and cannot by the juggling of labels, as applied to undisputed facts, deprive its citizens of federally-guaranteed rights, and a strike remains a strike in spite of whatever other name Wisconsin chooses to call it. Any definition of strike embodies four elements: (a) a leaving of employment; (b) by mutual understanding; (c) by a body of workmen; and (d) to enforce compliance with demands made on an employer (**Webster's International Dictionary, Second Edition, Unabridged, 1944**).

All the elements necessary to the existence of a strike were present here.

a. There was an act of quitting.

There is no dispute about the fact that the employees stopped their work and walked off the job, and in some in-

¹ This is explained by the testimony of Anthony Doria that the union had not tried to name the activities, and that the purpose of this type of activity was to stave off a full-time strike because of the hardships of having working men out on the street for long periods of time (R. 176-177).

stances did not report for work at all. The period of time for which they quit is not important, nor does any standard definition of the term "strike" set forth any prerequisite of time. It is submitted that the act of actually leaving the employment is a sufficient suspension of the employer-employee relationship to meet the element of quitting, which is in the definition of "striking."

It is difficult to extract from the Wisconsin Court's opinion the actual basis for its determination that there was no strike.

On the one hand it is emphasized that the withdrawing from employment, which characterizes a strike "implies something more than the temporary quitting with intent to resume commencement of work on the next shift." It is then stated that such withdrawal "implies a continuous withdrawal until the object of the strike is attained or the strike abandoned," and it is stated that there must be a "continuance of unemployment."

On either count the court is wrong. On the question of "intent", it is the intent to resume employment which distinguishes a strike from a voluntary quit. The important intent in any concerted stoppage is the purpose of the quit rather than the length of the leaving of employment. The purpose of the temporary quits in this case is undisputed. It was, to use the Wisconsin Court's own language:

"economic pressure to compel the company to comply with the union's demands respecting the terms of the contract being negotiated".

The employees; of course, hoped that one temporary quit would accomplish this purpose. But they were prepared to engage in a series of such quits, if necessary, to attain this end. The company was so advised (R. 166). There was, therefore, present here the necessary intent to

enforce collective bargaining demands, which is characteristic of a strike.

And, clearly, the court below is wrong when it seeks to interject a test of **continuous** unemployment, without an effort to return, until the demands are either met or abandoned.

This interpretation places a premium on length of unemployment. If this theory were correct it would nullify the short-lived strike. It would attempt to say that if employees have been defeated in their demands and have had to return to work without a satisfaction of their demands, but have returned to work with the reservation that they would try other means to persuade the employer to meet their demands (which is exactly what happened here), then the period during which they had a stoppage of work was not a strike. Certainly employees may engage in a series of strikes over a period of time, the first several of which may not yield any material results, but all of which, when taken together, will ultimately lead to the signing of an agreement. And even if we were to assume that an intent to return to work, regardless of whether the demands have been met, and without abandoning the demands, removes each work stoppage individually from the classification of "strike" and takes it out of the protection afforded to concerted activities, the fact remains that we do have here, as to each such stoppage, the additional and necessary intent to suspend employment until demands are met. It is absurd to assume, in the face of the record here, and in light of every-day realities, that it was not contemplated, as to each stoppage, that its duration would be more limited than originally anticipated, or that it would be the last stoppage if the employer yielded and signed an agreement. The employees were prepared to stay out of employment for only a stated period of time, even if

their demands were not met, but they were also prepared to terminate the stoppage and to resume employment upon the meeting of their demands if such contingency took place before the stated period of time. So, there was present here the basic intent, not only as to the whole series of stoppages, but as to each individual stoppage to return to work earlier, upon granting of the demands or the signing of an agreement.

b. The quitting was done by mutual understanding
and

c. By a body of workmen.

The presence of these two elements is not disputed in this case, and requires no argument.

d. The purpose of the action was to enforce compliance with demands made on the employer.

The record is clear that the stoppages were for the purpose, among other things, of enforcing the collective bargaining demands made upon the employer by the union. There can be no question that demands were made prior to the time of the stoppages since negotiations were in progress in respect to those demands, and since the Wisconsin Employment Relations Board did so find in its Finding of Fact No. 8, quoted earlier. The decision of the Wisconsin Supreme Court, while adopting such finding, completely ignores it in its attempt to call a strike not a strike.

The Activities Conform to Other Definitions of Strikes.

The Petitioners' activities were strikes as such terms are used and defined under the old and new Labor Relations Act, and the judgment therefore is in derogation of

rights assured by Section 13 of the National Labor Relations Act.

In **National Labor Relations Board v. Clinton Woolen Manufacturing Co.**, 141 Fed. (2d) 753, the Sixth Circuit Court of Appeals held as follows:

"The walk-out, for the purpose of holding an organizational meeting, was not only without consent of the respondent but in violation of its express instructions to remain. It is urged that by failing to discipline its employees for leaving the plant, the respondent engaged in an unfair labor practice. But discrimination against employees for union activity is condemned by the Act. **A walkout is, in practical aspect, a strike**, and strikers may not be discharged for exercising their inherent right to strike. **N. L. R. B. v. Fansteel Metallurgical Corp.**, 306 U. S. 240, 59 S. Ct. 490, 83 L. Ed. 627, 123 A. L. R. 599." (Emphasis ours.)

So here we have a Federal Circuit Court of Appeals holding that a walk-out to attend an organizational meeting was a strike, pursuant to the Federal law which at that time did not specifically define the term.

Moreover, since the Wagner Act has been amended after the occurrence of the acts herein described, the term "strike" has been defined² as

"Any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective bargaining agreement) and any concerted slow-down or other concerted interruption of operations by employees."

This definition, rather than limiting the meaning of the word "strike," as did the Wisconsin interpretation,

² Section 501 (2), Labor Management Relations Act of 1947, Act of June 23, 1947, Public Law 191, 80th Congress.

broadens it to include **any concerted stoppage of work or interruption of operations . . . by employees.** This definition refers to any stoppage, whether long or short, and doesn't embrace any time limitation.

Under the amended Labor Management Relations Act of 1947, the right to strike is still undiminished even though the act now imposes unfair labor practices on labor unions. Under the new law, Section 13 reads as follows:

"Section 13. Nothing in this act, except as specifically provided for herein, shall be construed so as to either interfere with or impede or diminish in any way the right to strike, or to effect the limitations or qualifications on that right."

The exception refers to Section 8 (b) of the new law, none of the provisions of which are applicable to the instant case. That Congress intended the Petitioners should have the right to do the things herein enumerated is apparent since it confirmed these rights by the passage of the Taft-Hartley Act. That Act imposed limitations on certain kinds of activities performed by labor unions. In effecting its limitations, the right to do what was here done was not curbed, and in the absence of such a limitation by the Congress on what was here done, that body reaffirmed in the present law the rights ascribed to the Petitioners under the old law.

In **Arthur v. Oaks, 63 Fed. 310**, it was held that it was an error to enjoin the employees from "striking" for the reason that included in the meaning of the word "strike" was the mere concurrence of a number of individuals in the exercise of their inherent right to quit their employment, and that no court ought to interfere with such quitting, unless they were bound by contract.

If these stoppages had occurred in the face of a contractual obligation entered into between the union and the employer containing an absolute prohibition of the right to strike, neither the court nor the employer would hesitate one minute in characterizing such activities as strike activities, regardless of what name or term was used by the union. But in the instant case, both the employer, in not having the protection of such contract, and the court seeking to protect the employer from what appears to be a new and novel means of calling daily strikes, sought to restrain such activities by refusing to assign the term "strike" to such activities.³

Whatever the employer might do by way of defense against the actions of the union, or whatever position the employer might find itself in for taking defensive measures against an employee is not involved in this case. What the court below has in effect said is that because employees may commit some act which might justify their employer's discharging them, the court therefore can restrain the employees from exercising such right.

We have treated rights of employer under Sections 7 and 13 separately because of the Wisconsin Court's peculiar approach to what is or is not a strike. Both sections should really be considered together, since Section 13 is a reaffirmation of the rights secured by Section 7, and cautions against any interpretation of Section 7 which may be a limitation on the right to strike. But, labels aside, it is clear that all that is involved here is a concerted activity for mutual aid and protection and in furtherance of legitimate collective bargaining demands. It is respectfully submitted that these concerted activities, considered individually or in series, are within the

³ The reason it was necessary for the court to rule on the question of the presence or absence of a strike was that the Petitioners' guilt or innocence of unfair labor practice charges under Sections 111.06 (2) (e) and (h) of the Wisconsin Statutes (See Appendix A) depended on whether their activities were or were not "strikes."

protection of the National Labor Relations Act and therefore not subject to restraint by the states.

C.

The Scope of the Order and Judgment May Not Conflict With the Rights Conferred by the Federal Law.

Whether Sections 7 or 13 of the National Labor Relations Act is involved, the restraining order of the Board and the judgment of the court must be limited to that field of labor relations which the National Labor Relations Act does not regulate, and the order and judgment may not encroach upon the rights of the Petitioners as granted by the Federal Law.

In the case of **Hill v. Florida**, 325 U. S. 538, 65 S. Ct. 1373, this court held that a Florida state statute was unconstitutional under the Commerce Clause because such statute required a collective bargaining representative to be licensed as a prerequisite to bargain, and there was no such restriction to be found in the National Labor Relations Act. The National Labor Relations Board had never assumed any jurisdiction in the matter nor made any determination. The court held that the Florida Statute was inconsistent with the provisions of the National Labor Relations Act and declared it unconstitutional. Similarly, in the case of **Alabama State Federation of Labor v. McAdory**, 325 U. S. 450, this court again indicated that it would pass upon questions relating to conflicts between State Laws and the National Labor Relations Act. The court refused to render a decision in that case only because of uncertainty as to how the State would apply the particular statute and not because of any failure of the National Labor Relations Board to have taken action in any particular case. This Court therefore has definitely taken the position that on questions involving conflict

between state and federal law, it would take the actual action of the State pursuant to State Statute and lay it alongside the provisions of the National Labor Relations Act for the purpose of determining whether any rights secured by that Act have been violated by State action.

We are cognizant of the rule that a state has discretion to deal with illegal concerted efforts in the settlement of industrial conflicts. But it is respectfully submitted that it is within the power of this court to reject a state determination if such determination is so without warrant as to be a palpable evasion of a right secured to the individual. Especially is this true of a right of constitutional rank. There is therefore no legal decision or statutory definition which can be urged as justification for a finding that a one-day work stoppage, or a series of such stoppages, for the purpose of obtaining the ultimate end of a satisfactory collective bargaining agreement, are not concerted activities for the purpose of collective bargaining, as guaranteed by the Federal Law.

A judgment enjoining such activities, and the Statute upon which it is based, are unconstitutional since they are contrary to the Federal laws enacted under the authority of Article I, Section 8 of the United States Constitution.

II.

A STATE CANNOT COMPEL EMPLOYEES ENGAGED IN A LABOR DISPUTE WITH THEIR EMPLOYER TO PERFORM WORK, NOR CAN IT ENJOIN PEACEFUL ASSEMBLY IN LIGHT OF THE THIRTEENTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

The order of the Board, as affirmed by the Supreme Court of Wisconsin, directs the union and the individually named officers to cease and desist from engaging in any

concerted efforts to interfere with production by arbitrarily calling union meetings and inducing work stoppages during regularly scheduled working hours, or any other activity, except by leaving the premises in an orderly manner for the purpose of going out on strike. Both the Board and the State Supreme Court excluded the activities engaged herein from the meaning of the term "strike."

As applied to the activities of the Petitioners, this means that Petitioners may not:

1. call union meetings during regularly scheduled working hours;
2. induce the kind of work stoppage engaged in here;
3. picket, boycott, or persuade others not to deal with the employer when not in conjunction with a state-defined strike. ("Any other activity.")

Such restraints preclude the right of free speech, assembly, and compel involuntary servitude. The decision of the State Supreme Court itself has said that the order operates on the individual members of the union, although the individual members are not named as defendants, and the judgment leaves no other conclusion than that the court intended to and did compel union members to perform work against their will, and to deprive them of free speech and assembly. Technically, the refusal of a single member-employee to work part of a day, as has been done in the past, will subject him to punishment for contempt. Picketing by a member without going out on the long, continuous strike that the State Supreme Court had in mind carries the consequence not alone of a fine, but of imprisonment.

The order would in effect chain the employees to their machines, seal their lips, and completely cut off communication with others, even during their off-working hours, for

the purpose of telling them about unfairness of their employer. And the judgment of the State Supreme Court has said in effect that they will enforce such order by fine or imprisonment if the chains are cut or the lips unsealed.

A.

The Order, Judgment, and Any Statute Upon Which They May Be Based, Violate the Thirteenth Amendment.

The judgment bars the discontinuance of, or refusal to report to work by agreement, as has been previously done, under the penalty of fine or imprisonment. This is involuntary servitude and violates the Thirteenth Amendment of the United States Constitution. Justice Brandeis, with Holmes concurring, dissented in **Bedford Cut Stone Company v. Journeymen Stone Cutters Association of North America, 274 U. S. 37**, with reference to the application of the Sherman and Clayton Acts to the activities of labor unions as follows:

“If, on the undisputed facts of this case, refusal to work can be enjoined, Congress created by the Sherman Law and the Clayton Act an instrument for imposing restraints upon labor which reminds one of involuntary servitude.”

And finally, many year later, in the case of **United States v. Hutcheson, 312 U. S. 219**, that dissenting opinion was adopted by a majority of the United States Supreme Court.

What social justification the State of Wisconsin can be fulfilling by requiring employees to work involuntarily cannot be seen. In **Pollock v. Williams, 322 U. S. 4**, the attempted justification was given that the fulfillment of contracts, and the collection of debts required such action by this court. But this court rejected that theory by declaring that such obligations cannot warrant a suspension of the right to be free from compulsory service and said,

“No state can make the quitting of work any component of a crime, or make criminal sanctions available for holding unwilling persons to labor.”

There are circumstances under which a man may be compelled to work against his will, but this can only be a punishment for a crime or in time of grave national emergency when he may be compelled to render service in behalf of the State against his will, but this kind of servitude the Government reserves only unto itself for the benefit of the governmental unit imposing the compulsion, not for the benefit of another.

In **Henderson v. Coleman**, 150 Fla. 185, 7 So. (2d) 117, the Supreme Court of Florida, refusing to hold members of a union in contempt of an injunction for failing to load or unload trucks, stated that if men were required to load or unload trucks, although there was no contractual relationship, then

“such construction would violate the constitutional provision above referred to.— We think it will not be contended that any member of the local could be committed to jail for refusing to load or unload the Collins trucks. . . .

“That service required the performance of manual labor and it is beyond the power of courts to punish one by imprisonment for failure to engage in involuntary servitude.

“ . . . We are not advised of any rule of law under which any man in this country may be forced to serve with his labor any other man whom he does not wish to serve.”

See also **Stapleton v. Mitchell**, 60 Fed. Sup. 51; **Carpenters Union v. Citizens Committee**, 333 Ill. 225, 164 N. E. 393; **Alabama State Federation of Labor v. McAdory**, 246 Ala. 1; **Lindsay v. Montana State Federation of Labor**, 37 Mont. 264, 96 Pac. 127; **Great Northern Railway Company**

v. Brousseau, 286 Fed. 414; In Re: Porterfield, 147 Pac. (2d) 15 (Calif.); Ex Parte Blaney, 184 Pac. (2d) 892; Greenwood v. Hotel and Restaurant Employees, 30 So. (2d) 696.

Nor is freedom from involuntary servitude guaranteed only to the individual; it is also assured to the worker in combination with others. If one person may quit his job for any or no reason, there is no reason why two or more cannot do the same, and this is true where the leaving of the job results because of a desire either for a satisfactory collective bargaining agreement, or to attend a union meeting. Single action was early recognized as an inadequate weapon with which to arm the industrial combatant. In the case of **American Steel Foundries v. Tri-City Central Trade Council**, 257 U. S. 184, Chief Justice Taft said:

“They (labor organizations) were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers an opportunity to deal on equality with their employer. They united to exert influence upon him and to leave him in a body in order by this inconvenience to induce him to make better terms with them. They were withholding their labor of economic value to make him pay what they thought it was worth. The right to combine for such a lawful purpose has in many years not been denied by any court.”

But the Wisconsin Court has said that when the stoppage

“is such a step in a concerted plan to do an unlawful act, it may be enjoined. The quitting and remaining

away from work * * * was done pursuant to a conspiracy to carry out an unlawful plan." (See opinion herein.)

The Wisconsin Court relied on **Aikens v. Wisconsin**, 195 U. S. 1945, and **Dorchy v. Kansas**, 272 U. S. 306, as its authority.

The State has declared that its Statute makes concerted action of an otherwise lawful act illegal. And so there actually is no concerted plan to do an unlawful act as in the **Dorchy** and **Aikens Cases**, but, rather, a concerted plan to do a lawful act, the concert of which is illegal. The Wisconsin Supreme Court proceeds on the false premise that the stoppage is illegal. This is not so. The **Dorchy Case** did not involve the right to strike, but involved only the application of a **criminal statute** to an officer of the labor union who had induced a strike for the illegal purpose of collecting a stale wage claim at a time when there was no other labor dispute between the union and the company. The issue in that case did not involve an injunction, but the right of the State to punish for a crime. In addition, the cases relied on by the court below do not place an absolute ban on the right to quit work, in the absence of a criminal conspiracy.

In the face of the social philosophy, as expounded by this court in **American Steel Foundries v. Tri-City Central, etc.**, supra, may the State of Wisconsin declare that the combination of two or more persons to do what one person may lawfully do constitutes a legal wrong? May it say that two persons cannot agree to exercise their right not to work in protest against oppressive conditions and thereby deprive them of this constitutional right? If this is true, such protection from involuntary servitude becomes a mere sham and does not exist for any real purpose. For the exercise of this kind of freedom, as pro-

scribed by the State of Wisconsin, can never lead to the improvement or enlightenment of the working man's status, but only to his degradation and further economic enslavement. It was for the implementation of this kind of right that the Wagner Labor Relations Act was originally enacted, and which this court upheld in **National Labor Relations Board v. Jones & Laughlin Steel Corp.**, 301 U. S. 1. To give this restrictive meaning to the right would emasculate the entire letter and spirit of both the Thirteenth Amendment and the National Labor Relations Act. This court termed the right of working men to organize and in concert withhold their labor for the purpose of defending their jobs and protecting their standards of wages and working conditions as "fundamental rights", (**N. L. R. B. v. Jones & Laughlin Steel Corp.**, supra), because such concerted activities are an exercise of liberty and freedom of speech and assembly protected by the Fourteenth Amendment, as well as being preserved by the Thirteenth Amendment.

Further, the State, by limiting the right to refrain from work to individual action, loses sight of the fact that

"the interdependence of economic interest of all engaged in the same industry has become a commonplace."⁴

And the rule that

"The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, whether those limits be defined by statute or judicial order of the State." (**A. F. of L. v. Swing**, supra.)

This rule is also applicable to the Thirteenth Amendment. Nor can the State of Wisconsin legally say under

⁴ American Federation of Labor v. Swing, 312 U. S. 331.

Section 111.06 (2) (c)⁵ that the right of a minority to refrain from work shall be dependent upon a majority of employees of the employer who may have a different viewpoint from the minority. (See **West Virginia v. Barnette**, 319 U. S. 624, and **Alabama State Federation of Labor v. McAdory**, supra.) The judgment and order entered in this case, and the statute upon which it is based, and which the Wisconsin Supreme Court construed, compels working people to labor against their will for the sole benefit of their employer, the Briggs & Stratton Corporation.

B.

The Direction for Judgment, Order and Statute, Upon Which They May Be Based, Violates the Fourteenth Amendment to the United States Constitution.

Concerted activities for the purpose of collective bargaining, or other mutual aid or protection, are rights which are assured by the Fourteenth Amendment. It is submitted that that part of the order which forbids the union from arbitrarily calling union meetings during regularly scheduled working hours is unconstitutional. Here, too, the Board and Court have taken the position that, because the employees may have done something which may justify the employer's discharging them, the court may enjoin the employees from attending a union meeting.

A thorough discussion of the right of free and lawful assembly may be found in **Thomas v. Collins**, 323 U. S. 516. There this court said that a State may not curb that area of free speech and assembly as set apart from regulation by the Constitution.

⁵ Section 111.06 (2) (c), Wisconsin Statutes, is involved in this case only because of the term "strike," since if the Petitioners' activities did not constitute a strike under Section 111.06 (2) (h), and the Petitioners were guilty of violating that Section, the Petitioners were also automatically guilty of violating Section 111.06 (2) (c). And their rights under the Thirteenth Amendment then become subject to the rule of the majority.

"Such (state) regulation, however, whether aimed at fraud or other abuses, must not trespass upon the domains set apart for free speech and free assembly. . . . Lawful public assemblies, involving no element of grave and immediate danger to an interest the State is entitled to protect, are not instruments of harm which require previous identification of the speakers."

"The restraint is not small when it is considered what was restrained. The right is a national right, federally guaranteed. There is some modicum of freedom of thought, speech and assembly which all citizens of the Republic may exercise throughout its length and breadth, which no State, nor all together, nor the Nation itself, can prohibit, restrain or impede."

And Justice Jackson, in a concurring opinion in this same case, had this to say:

"This liberty (peaceable assemblage) was not protected because the forefathers expected its use would always be agreeable to those in authority or that its exercise always would be wise, temperate, or useful to society. As I read their intentions, this liberty was protected because they knew of no other way by which free men could conduct representative democracy."

See also **DeJonge v. State of Oregon**, 299 U. S. 353, 81 L. Ed. 278, and **Hague v. Committee of Industrial Organization**, 307 U. S. 496, 83 L. Ed. 1423.

The mere fact that the meetings conflict with the running of a plant of a private employer is no basis for any injunctive order, except in reasonable apprehension of danger to an organized government. **Herndon v. Lowry**, 301 U. S. 242. The only danger shown here is that of

economic injury to the employer. This is not a substantive evil of such magnitude as to justify a limit to the constitutional rights which Petitioners exercise. **Bakery and Pastry Drivers, etc., v. Wohl**, 315 U. S. 769.

In the case of **Thornhill v. Alabama**, 310 U. S. 88,

“ * * * Danger of injury to an industrial concern is neither so serious nor so imminent as to justify the sweeping proscription of freedom of discussion. * * * ”

The right to lawful assembly is the highest kind of right, and such rights may only be curbed when they are abused. This court has held in the case of **Near v. Minnesota**, 283 U. S. 697, 75 L. Ed. 1357, that the appropriate remedy for such abuse is punishment, and that an injunction seeking to prevent the use of the right is violative of the Fourteenth Amendment.

Since what has been done by the Petitioners has been termed a concomitant of a strike, such an interpretation is violative of the Fourteenth Amendment, since under Sec. 111.06 (2) (e) of the Wis. Statutes it conditions the Petitioners' right to peaceful assembly upon the consent of others who may have no interest in the purposes of assembly of a minority. In **West Virginia v. Barnette**, supra, this court said:

“ The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections. ”

The State of Wisconsin has decreed that it is illegal for two or more persons to act in concert to refrain from work

or peacefully assemble unless the exercise of such constitutional right has been sanctioned by a majority in the collective bargaining unit. It thereby renders the Constitution inapplicable to a minority.

What the Wisconsin Court did to clothe its injunctive direction with legality as it applied to each constitutional right which the Petitioners claimed was violated, was to find general language in a United States Supreme Court opinion, which struck down the kind of restraint here attempted to be enforced, and through which this court left the door open for proper action in a proper case. On finding such language, the Wisconsin Court said that in each instance the restraint came within such concession and arbitrarily declared that this case was distinguishable from the United States Supreme Court case cited.

III.

SIGNIFICANCE AND EFFECT OF THE INJUNCTION AND STATUTE AS INTERPRETED BY THE WIS- CONSIN SUPREME COURT, IF PERMITTED TO STAND.

The Wisconsin Statutes, as originally written, were clearly not intended to interfere with or impede the right to strike. But the Wisconsin Supreme Court has emasculated the Statutes in two ways:

1. Although the Wisconsin Legislature expressly exempted from its definition of unfair labor practices concerted interference with production, which is caused by peaceful leaving of the premises, as distinguished from on-the-premise activities (such as a "sit-down strike"),⁶ the Wisconsin Court by unrealistically quibbling over the definition of "strike" has not only engaged in judicial legislation, but made a mockery of a basic right.

⁶ Section 111.06 (2) (h), Wisconsin Statutes.

2. By holding the activities were concomitants of a strike instead of a strike. The court thus flatly ignored the obvious fact that withdrawal from employment is the strike. This holding was then extended into further error, by saying that the provisions of Section 111.06 (2) (c) which requires secret ballot majority approval for concomitants of a strike were not complied with since the court refused to accept the secret ballot in fact taken because the word "strike" was not used in the motion authorizing the activities (R. 209).

The Wisconsin Court has stated that the order bans "the individual defendants and the members of the Union from 'engaging in concerted effort' to interfere with production by doing the acts instantly involved."

The acts involved are the peaceful leaving of the premises or the peaceful refusal to enter upon the premises. They include the attendance at union meetings. The continuance of these activities is intended until collective bargaining demands are met.

The only exception to this sweeping restraint is the strike which "greater quitting" as defined by the Court implies a "continuous withdrawal until the object of the strike is attained or the strike abandoned." Apparently it is only this element of the definition of the term that the Wisconsin Court said is missing in this case, since the other elements of concerted quit by mutual understanding to enforce compliance with demands are concededly present.

The order, therefore, as construed by the Court, bans any quit with intention to resume employment unless the intention is to suspend work until demands are achieved or abandoned.

It is this forbidden quitting which the order prevents and which is subject to fine or imprisonment.

In other words the Wisconsin Court says to working men:

You may quit your jobs entirely if you do not intend to come back and if you, in fact, do not come back; or you may quit your jobs conditionally if you intend to return when your collective bargaining demands are either met by the employer or abandoned by you; but you dare not quit conditionally if you intend to return without gaining or abandoning your demands. For example: Suppose the employees decided that they would stay out for only one week, since that was the maximum in wages which they could afford to sacrifice at that particular time, and intended to return after that week, even though their demands had not been met and without abandoning those demands, such stoppage on the face of it would be a violation of the order since it does not come within the Wisconsin Court's definition of the term "strike." Yet the employees surely also had an intent to return to work if their demands were met at any time during that week. It is this additional intent which the court has completely overlooked and which is present in this case also, although the periods of the stoppages were shorter. And under the Court's construction of the order and its definition of the term "strike," the State of Wisconsin could institute contempt proceedings and require punishment of the employees within one-half hour after they went out on strike even though at some time during the period of the contemplated strike, and while the contempt proceedings were pending the employer acceded to the demands and signed a contract.

The order, therefore, not only imposes involuntary servitude, compels personal service, punishes for failure to render service, punishes for attempting to render service, and denies the rights of free speech and assembly, but also is so indefinite and vague as to be incapable of understanding as to what may or may not be done under its terms, all

in violation of the Thirteenth and Fourteenth Amendments to the Constitution of the United States.

Additionally, whether there has been violation of the order depends in the final analysis upon the employer. The order places in the employer's hands the ultimate power to ~~cause its violation by refusing~~ to accede to legitimate collective bargaining requests or by ~~prolonging~~ the negotiations! The employer can compel the employees either to stay at work indefinitely or to strike indefinitely, with no middle road available to them.

And doesn't it border on the absurd to say that whether a quit is in violation of the law or of the court order is dependent upon the circumstances under which it is intended to return? Isn't that really the problem of the employee and the employer?

Even if the State has the right to define these tactics as unfair labor practices and had a right to direct remedies such as money damages, it certainly has no constitutional right or authority to say to these employees: "If you quit temporarily with the intention of returning, even though you leave the premises in an orderly fashion, and if you return, without waiving your objection to the conditions which caused you to leave, you shall be fined or imprisoned."

CONCLUSION.

These proceedings come to the attention of this court primarily because of the misinterpretation of the term "Strike" by the Wisconsin Supreme Court. Such interpretation is to take concerted activities which have been historically defined by judicial determination and statutes as strikes and render the federal guarantees of these rights utterly meaningless.

The kind of strike carried on here by the Petitioners is one which the State Administrative Agency and all

judicial branches should encourage, as compared to a long, protracted, full-time strike. By its very nature it causes far less economic hardship on all parties, the employee, the employer, and the consuming public. For the employee it makes possible regular pay checks; for the employer it continues production. For the consumer it makes available a product.

The series of short stoppages can accomplish the same end as the long, continuous strike. By this device the working man can secure for himself, over a long haul what he may not be able to attain over a much shorter, continuous period financed by his own reserves. And so the short-time strike serves to place the working man on a more equal bargaining basis by removing the need for financial resources to support demands at the bargaining table.

The State of Wisconsin has in this case declared that the concerted refusal of working men to perform labor in an effort to bring about better working conditions for themselves is subject to any limitations which the state seeks to impose. Further, the state has restrained the lawful right to peaceful assembly. If our house of freedom is to be a hope for all society and free from oppression, we must be alert against the threat of unconstitutionality in any form reaching in and turning it into a trap for tyranny.

Respectfully submitted,

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APPENDIX A.

Wisconsin Statutes:

"Section 111.04, Rights of employees. Employees shall have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection; and such employees shall also have the right to refrain from any or all of such activities."

* * * * *

"Section 111.06, What are unfair labor practices.
(2) It shall be an unfair labor practice for an employee individually or in concert with others:

* * * * *

"(e) To cooperate in engaging in, promoting or inducing picketing (not constituting an exercise of constitutionally guaranteed free speech), boycotting or any other overt concomitant of a strike unless a majority in a collective bargaining unit of the employees of an employer against whom such acts are primarily directed have voted by secret ballot to call a strike.

* * * * *

"(h) To take unauthorized possession of property of the employer or to engage in any concerted effort to interfere with production except by leaving the premises in an orderly manner for the purpose of going on strike."

* * * * *

"Section 111.15, Construction of this chapter. Except as specifically provided in this chapter, nothing

therein shall be construed so as to interfere with or impede or diminish in any way the right to strike or the right of individuals to work; nor shall anything in this chapter be so construed as to invade unlawfully the right to freedom of speech. And nothing in this chapter shall be so construed or applied as to deprive any employe of any unemployment benefit which he might otherwise be entitled to receive under chapter 108 of the statutes."

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1948.

Nos. 14 and 15.

INTERNATIONAL UNION, UNITED AUTOMOBILE WORKERS OF AMERICA, A. F. of L., LOCAL 232; ANTHONY DORIA, CLIFFORD MATCHEY, WALTER BERGER, ERWIN FLEISCHER, JOHN M. CORBETT, OLIVER DOSTALER, CLARENCE EHLMANN, HERBERT JACOBSEN, LOUIS LASS,

Petitioners,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, HENRY RULE and J. E. FITZGIBBON, as Members of the Wisconsin Employment Relations Board; and BRIGGS & STRATTON CORPORATION, a Corporation,

Respondents.

PETITIONERS' BRIEF.

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INDEX.

SUBJECT INDEX.

Page

The opinion of the Court below	1
Statement as to jurisdiction	1
Statement of the case	4
Proceedings below	7
Specification of errors	9
Summary of argument	10
Argument	13

I.

The judgment and statute as construed and applied by the Wisconsin Supreme Court in this case are in derogation of rights secured to the petitioners by federal law and are, therefore, unconstitutional and void because in violation of Article I, Section 8, and Article VI of the Constitution of the United States.. 13

A. The general principle involved: State regulation resulting in deprivation of rights under federal regulation must yield to the superior federal power

13

B. The restrained activities in the instant case are protected activities under Section 7 of the National Labor Relations Act

15

C. Section 111.06 (2) (h) as construed and applied in this case affords no valid basis for limitation of the protected right and is, therefore, unconstitutional

18

1. The activities in and of themselves were not declared to be unlawful. The unlawfulness was found in their purpose to interfere with production

20

2. The purpose of the activities was to attain legitimate collective bargaining demands, a purpose which is fostered and protected by the National Labor Relations Act

22

3. Conclusion and summary on the constitutionality of Section 111.06 (2) (h) and the judgment based thereon	26
D. Section 111.06 (2) (e) as construed and applied in this case affords no valid basis for limitation of the protected right and is, therefore, unconstitutional	29
E. The activities are also protected under Section 13 of the federal Act. They were strikes both in fact and in law	31
F. Brief answer to contentions of respondents.....	38
1. Answer to respondents' argument that the Order only <u>requires</u> that petitioners make their position and their objective known.....	39
2. Answer to respondents' suggestion that the activities were for the unlawful objective of attaining a maintenance of membership clause contrary to state law.....	40
3. Answer to respondents' position that the activities were an attempt to take over unilateral control of working hours and without release of control over the means of production	41

II.

The Wisconsin Board and Courts had no jurisdiction over the subject matter. The order and judgment are, therefore, void under Article I, Section 8, and Article VI of the Constitution of the United States... 46

III.

A State cannot compel employees engaged in a labor dispute with their employer to cease and desist from concerted work stoppages or from inducing such stoppages. Such restraint of basic civil rights is contrary to the Thirteenth and Fourteenth Amendments to the Constitution of the United States..... 55

A. The order, judgment, and any statute upon which they may be based violate the Thirteenth Amendment to the Constitution of the United States... 57

B. The order and judgment and any statute upon which they may be based violate the Fourteenth Amendment to the Constitution of the United States	63
Conclusion on the Thirteenth and Fourteenth Amendments	68

IV.

Section 111.06 (2) (c) of the Wisconsin Statutes and the order and judgment, insofar as they are purportedly based upon such provision, are unconstitutional and void, because contrary to and in violation of Fourteenth Amendment to the Constitution of the United States	69
Conclusion	76

Table of Cases Cited.

A. F. of L. v. Swing, 312 U. S. 321	24, 72
Aikens v. Wisconsin, 195 U. S. 194	24
Alabama State Federation of Labor v. McAdory, 18 So. (2d) 810 (Ala., 1944)	59
Allen-Bradley Co. v. Local Union No. 3, I. B. E. W., 325 U. S. 797, 805	25
Allen-Bradley, Local 1111, et al. v. Wisconsin Employment Relations Board et al., 315 U. S. 740	13, 14, 27, 46
American Chain and Cable Co., Inc., v. Truck Drivers & Helpers Union, 68 F. Supp. 54	30
American Federation of Labor v. Reilly, 155 Pac. (2d) 145 (Colo., 1944)	59
American Manufacturing Concern, 7 N. L. R. B. 753	33, 43
American Steel Foundries v. Tri-City Central Trades Council, 257 U. S. 184, 209	15, 16, 23, 26, 47, 62
Apex Hosiery Company v. Leader, 310 U. S. 469	23
Arthur v. Oakes, 63 Fed. 310	59
Bailey v. Alabama, 219 U. S. 219, 241	57
Bakery and Pastry Drivers, etc., v. Wohl, 315 U. S. 769, 775	67
Barton Brass Works, 78 N. L. R. B. No. 56	43
Bedford Cut Stone Company v. Journeymen Stone Cutters Association of North America, 274 U. S. 37, 65	58

Bethlehem Steel Company v. New York State Labor Relations Board, 330 U. S. 767.....	12, 46, 47, 51
C. G. Conn, Ltd., v. N. L. R. B., 108 F. (2d) 390 (C. C. A. 7th, 1939)	44
Cantwell v. Connecticut, 310 U. S. 296.....	75
Carpenter v. Wabash Railway, 309 U. S. 23, 27.....	47
Cohn and Roth Electric Co. v. Brick Layers et al., 101 Atl. 659 (Conn., 1917).....	59
Connolly v. Union Sewer Pipe Company, 184 U. S. 540.....	70
Cudahy Packing Co., 29 N. L. R. B. 830.....	43
DeJonge v. State of Oregon, 299 U. S. 353.....	66
Dorchy v. Kansas, 272 U. S. 306.....	58
Ex Parte Blaney, 184 Pac. 892 (Calif., 1947).....	59
Follett v. McCormick, 321 U. S. 573 (1944).....	76
Gerry v. Superior Court, 194 P. (2) 689 (Calif., 1948).....	51
Great Northern Railway Company v. Brosseau, 286 Fed. 414	59
Hague v. C. I. O., 307 U. S. 496.....	65, 75
Hamilton v. N. L. R. B., 160 F. (2) 465 (C. C. A. 6th, 1947), cert. denied sub nom. Kalamazoo Stationery Co. v. N. L. R. B., 332 U. S. 152 (Oct. 1947).....	30, 31
Harnischfeger Corporation, 9 N. L. R. B. 676.....	33, 43
Henderson v. Coleman, 7 So. (2d) 117 (Fla., 1942)....	59
Herndon v. Lowry, 301 U. S. 242, 258.....	67
Hill v. Florida, 325 U. S. 538.....	14, 47
Hotel & Restaurant Employees etc. v. Greenwood, 30 So. (2d) 696 (Ala., 1947).....	59
Hotel and Restaurant Employees International Union v. Wisconsin Employment Relations Board, 315 U. S. 437	70
Hromek v. Frei Gemeinde, 238 Wis. 204, 209, 298 N. W. 587	26, 55
In re Duluth Bottling Association (1943), 48 N. L. R. B. 1335	44
In re Porterfield, 168 Pac. (2d) 706 (Calif., 1946)....	59
In re Republic Steel Corporation, 62 N. L. R. B. 1008 (1945)	30
International Brotherhood of Paper Makers v. Wisconsin Employment Relations Board, 245 Wis. 541, 15 N. W. (2) 806.....	41

Iron Moulders Union v. Allis-Chalmers, 166 F. 45, 46 (C. C. A. 6th, 1908)	35, 59
Largent v. Texas, 318 U. S. 418 (1943)	75
Lindsay v. Montana State Federation, 96 Pac. 127 (1908)	59, 60
Lovell v. Griffin, 303 U. S. 444 (1938)	75
Massey Gin and Machine Works, Inc., 78 N. L. R. B. No. (July, 1948)	33, 43
Michaelson v. U. S., 291 F. 940 (C. C. A. 7th, 1923) ...	35
Milk Wagon Drivers' Union, Local 723, v. Meadow- moor Dairies, Inc., 312 U. S. 287, 293	24, 34, 35, 61
Mogul Steamship Company v. McGregor, L. R. 23, Q. B. Div. 598 (1889)	26
Mugler v. Kansas, 123 U. S. 623, 661 (1887)	32
Murdoch v. Pennsylvania, 319 U. S. 105 (1943)	75
N. L. R. B. v. Budd Manufacturing Company, 92 Law. Ed. (adv. op.) 210	47
N. L. R. B. v. Carlisle Lumber Co., 94 F. (2d) 138, 145 (C. C. A. 9th, 1937)	35
N. L. R. B. v. Columbian Enameling & Stamping Co., 306 U. S. 292 (1939)	43
N. L. R. B. v. Fansteel Metallurgical Corp., 306 U. S. 240	18, 23, 32, 43
N. L. R. B. v. Hearst Publications, Inc., 322 U. S. 111, 123 (1944)	30
N. L. R. B. v. Mackay Radio and Telegraph Company, 304 U. S. 333	25, 43
N. L. R. B. v. Reed & Prince Manufacturing Company, 118 Fed. (2) 874 (C. C. A. 1st, 1941), cert. denied 313 U. S. 595 (1941)	30
N. L. R. B. v. Sands Mfg. Co., 306 U. S. 332 (1939)	43
National Labor Relations Board v. Jones & Laughlin Steel Corporation, 301 U. S. 1	16, 62
National Protective Association v. Cumming, 63 N. E. 369 (N. Y., 1902)	59, 60
Near v. Minnesota, 283 U. S. 697	68
Niles Firebrick Co., 30 N. L. R. B. 426, enforced 124 F. (2) 366, cert. denied 316 U. S. 664	33
Niles Fire Brick Co., 30 N. L. R. B. 426, enforced 128 F. (2) 258	43

Palko v. Connecticut, 302 U. S. 319, 323.....	35
Pickett v. Walsh, 78 N. E. 753 (Mass., 1906).....	59
Pollock v. Williams, 322 U. S. 4, 17.....	57
Schenck v. United States, 249 U. S. 47, 52 (1919).....	62
Thomas v. Collins, 323 U. S. 516.....	62, 75
Schneider v. State of New Jersey, 308 U. S. 147.....	75
Sein v. Tile Layers Union, 301 U. S. 468.....	24, 44, 65
Snyder v. Milwaukee, 308 U. S. 147.....	65
Southern Steamship Co. v. N. L. R. B., 316 U. S. 31 (1942)	43
Spencer Auto Electric, Inc., 73 N. L. R. B. 1416.....	33, 43
Stapleton v. Mitchell, 60 Fed. Sup. 51.....	59
Texas and New Orleans Railway Company v. Railway and Steamship Clerks, 281 U. S. 548.....	16
The Good Coal Co., 12 N. L. R. B. 136, enforced 110 F. (2) 501, cert. denied 310 U. S. 630.....	43
Thomas v. Collins, 323 U. S. 516.....	62, 65, 75
Thornhill v. Alabama, 310 U. S. 88.....	24, 65
Truax v. Raich, 239 U. S. 33 (1915).....	74
U. S. v. Hutcheson, 312 U. S. 219.....	24, 58, 62
Union Pacific Railroad Company v. Ruef, 120 Fed. 102	59
Vegeahn v. Guntner, 167 Mass. 92, 105-106, 44 N. E. 1077 (1896)	26
West Virginia v. Barnette, 319 U. S. 624.....	75, 76
Western Cartridge Co. v. N. L. R. B., 139 F. (2d) 855, 858 (C. C. A. 7th, 1943).....	30
Wolf Packing Company v. Court of Industrial Rela- tions, 262 U. S. 522, and 267 U. S. 552.....	64
Yoerg Brewing Co. v. Brennan, 59 F. Supp. 625.....	30

Statutes Cited.

Act of Congress of Feb. 13, 1925, Sec. 237-b, 28 U. S. C. A., Sec. 344-b	1
Clayton Act, 38 Stat. 78, 29 U. S. C., para. 52.....	62
Constitution of the United States:	
Art. VI	2, 13, 78
Amendment 13	2, 9, 68, 78
Amendment 14	2, 9, 63, 68, 78
Art. I, Sec. 8	2, 9, 13, 78

Labor Management Relations Act of 1947, Act of Congress June 23, 1947, c. 120, Public Law 101, Eightieth Congress, First Session (61 Stat. 136)	2, 11, 15, 33, 48, 52
National Labor Relations Act, 49 Stats. 449, U. S. C., tit. 29, para. 151-166	2, 13, 15, 49, 62, 72
Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C., para. 101-115	62
Wisconsin Employment Relations Act, Chapter 111, Wis. Stats. 1939	13, 52, 72
Wisconsin Statutes, 1945:	
Sec. 111.01 through 111.19	2, 28, 69
Sec. 111.06 (2) (e)	
and (h)	2, 9, 10, 12, 18, 19, 21, 28, 29, 69, 70

Miscellaneous Authorities.

Code of Federal Regulations, Title 29, Ch. II, Part 204 (13 F. R. 654)	52
42 Columbia Law Review 702, 704	68
47 Columbia Law Review 299	68
8 Harvard Law Review 1 (1894), Justice Holmes, "Privilege, Malice and Intent"	26
35 Harvard Law Review 398, 427 (1922), Sayre "Criminal Conspiracy"	61
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Restatement of the Law of Torts, Volume IV, pages 101-104	24
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1948.

Nos. 14 and 15.

INTERNATIONAL UNION, UNITED AUTOMOBILE WORKERS OF AMERICA, A. F. of L., LOCAL 232; ANTHONY DORIA, CLIFFORD MATCHEY, WALTER BERGER, ERWIN FLEISCHER, JOHN M. CORBETT, OLIVER DOSTALER, CLARENCE EHLMANN, HERBERT JACOBSEN, LOUIS LASS, Petitioners,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, HENRY RULE and J. E. FITZGIBBON, as Members of the Wisconsin Employment Relations Board; and BRIGGS & STRATTON CORPORATION, a Corporation, Respondents.

PETITIONERS' BRIEF.

THE OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of the State of Wisconsin is reported in 250 Wis. 550, 27 N. W. (2d) 875 (R. 106-121).

STATEMENT AS TO JURISDICTION.

This case is one over which the Court has jurisdiction under the provisions of the Act of Congress of February 13, 1925, Section 237-b, 28 U. S. C. A., Section 344-b, giving jurisdiction to this Court:

“to require that there be certified to it for review and determination with the same power and authority and with like effect as if brought up by appeal any cause wherein a final judgment or decree has been rendered and passed by the highest court of a state in which a decision could be had where is drawn in question the

validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any state on the ground of being repugnant to the Constitution or laws of the United States; or where any title, right, privilege or immunity is especially set up or claimed by either party under the Constitution. * * *

In this case the validity of the Statutes of the State of Wisconsin, to-wit: Sections 111.01 through 111.19, Wisconsin Statutes 1945, particularly 111.06 (2) (e) and (h), and a direction to enter judgment enforcing an order which is purportedly based on such statutes, is drawn into question upon the ground that such statutes, order and judgment on their face, and as construed in the opinion and judgment of the Supreme Court of the State of Wisconsin, are repugnant to Article I, Section 8, and Article VI of the United States Constitution, in that they are contrary to, and in violation of, rights conferred and duties imposed by superior federal legislation, to-wit: the National Labor Relations Act, 49 Stats. 449, U. S. C. tit. 29, Para. 151-166, and the Labor Management Relations Act of 1947, Act of Congress June 23, 1947, c. 120, Public Law 101, Eightieth Congress, First Session (61 Stat. 136); Section 1 of the Thirteenth Amendment to the Constitution of the United States, in that they impose involuntary servitude; and Section 1 of the Fourteenth Amendment to the United States Constitution, in that they deprive petitioners of liberty or property without due process of law, deprive petitioners of the equal protection of the laws, and more particularly deny to the Petitioners freedom of speech and assembly.

The decision of the Wisconsin Supreme Court was in favor of the validity of the statutes and order. The Supreme Court of the State of Wisconsin rendered its decision herein on June 10, 1947, and denied a motion for rehearing on the 9th day of September, 1947.

Said opinion of the Supreme Court of the State of Wisconsin, the last resort of all causes in the State of Wisconsin, is officially reported in 250 Wis. 550, 27 N. W. (2) 875 (R. 106-121).

Petitioners argued before the Wisconsin Employment Relations Board (R. 30-31), before the Circuit Court of Milwaukee County (R. 21-22; 90-94), and before the Supreme Court of the State of Wisconsin (see Decision, R. 106-121); that Section 111.04 and Section 111.06 (2) (e) and (h) of the Wisconsin Statutes, and the order of the Board based on the Wisconsin Statutes, as construed, were unconstitutional, void, and of no effect whatsoever for the reasons previously set forth herein.

The Federal question of whether the Wisconsin Statutes in question and the order and judgment purportedly based on such statutes violated the Constitution of the United States thus was raised before every tribunal before which argument was heard.

The Supreme Court of the State of Wisconsin specifically held that neither the Wisconsin Statutes nor the order based on such statutes, as construed, deprive the petitioners of any rights guaranteed under the provisions of the Constitution of the United States.

Thus the Wisconsin Supreme Court has taken the position that mere work stoppages in connection with a labor dispute, but not associated with any violence, boycotting, or picketing, are validly restrained by the order and judgment herein; that such restraints are supported by the provisions of Chapter 111, Wisconsin Statutes 1945, and that the question of the violation of constitutional guarantees alleged by the petitioners to have been breached by the order should be determined adversely to the petitioners.

STATEMENT OF THE CASE.

This case involves the right of employees to withhold their services for periods of one day or less, and at irregular intervals of time, either by peacefully leaving their employer's premises or by refusing to enter upon such premises, and by attending union meetings during such stoppages, all for the purpose of attaining lawful collective bargaining demands.

The Briggs & Stratton Corporation (hereinafter referred to as the "Company") operates two manufacturing plants (hereinafter referred to as the East and West plants) in Milwaukee, Wisconsin, and engages the services of approximately 2000 employees for hire in the State of Wisconsin (R. 33). The International Union, United Automobile Workers of America, A. F. of L., Local 232 (hereinafter called the "Union"), represents the production workers of the Company as their collective bargaining agent having been duly certified as such in March, 1938, by the National Labor Relations Board under the provisions of the National Labor Relations Act, (Findings of Fact, No. 4, R. 15; R. 33, 40).

Following such certification the Company and the Union entered into various collective bargaining agreements, the last of which expired on July 1, 1944 (Finding of Fact No. 4, R. 15; R. 34). Because the parties could not agree upon the terms of a new agreement the dispute was submitted to the National War Labor Board in June, 1944, under authority of the War Labor Disputes Act of 1943, 57 Stat. 163, 50 U. S. C. Par. 1501, 1508, and Executive Order No. 9017; the National War Labor Board entered its order on December 20, 1945 directing the Company to put into effect certain wages and working conditions requested by the union; from the time of the entry of the Directive Order of the National War Labor Board until

the hearing before the Wisconsin Employment Relations Board (hereinafter referred to as the State Board) in the present proceedings, the Company made no effort to comply with any of the terms of such order, although the Union sought to induce the Company to do so (R. 19 [Board's Decision], 34, 43.) The company had previously refused to comply with the recommendation of a tri-par-tite panel, and with a directive of the Regional War Labor Board (R. 34). The issues before the War Labor Board covered maintenance of membership, check-off, vacations, wages and similar items (R. 35, 43).

After V-J Day, August 15, 1945 the Union raised new demands relating primarily to wages; and bargaining sessions continued down to the date of the hearing before the Wisconsin Employment Relations Board (R. 35).

On November 3, 1945 at a special meeting of the members of the Union and after discussion of the apparent stalemate of the negotiations between the Union and Company, a motion was unanimously passed empowering the Executive Board of the Union to call a special meeting during working hours at any time as such Board saw fit (R. 47-48). This action was taken by voice vote. The membership is the highest authority of the Union, and it is the duty of the officers to carry out the directions and desires of the members (R. 44).

Subsequently, a number of such stoppages for the purpose of attending union meetings were called from time to time. The first one occurred on November 6, 1945; no advance notice was given to the Company prior to such stoppages; stoppages occurred usually during the first shift, which operated at the East plant from 8 A. M. to 5 P. M., and at the West plant from 7 A. M. to 3:30 P. M.; the employees would leave some time during the first shift (sometimes as early as 8:30 A. M. or as late as 1:30 P. M.) and would not return to work that day, but would report

back to work the following day for the regularly scheduled shift; employees on the second shift, with working hours from 3:30 P. M. to 12 Midnight at both plants, sometimes did and sometimes did not report to work on the days the employees on the first shift left; on days when they reported to work the employees on the second shift worked their full shift; on days when most second-shift employees did not report to work, they would report the following day for their regularly scheduled hours (R. 15-16, 35-37, 49). No disciplinary action was taken by the Company (R. 36, 40). The walkouts curtailed production and delayed shipments (R. 37).

On February 15th, 1946, after several stoppages, a secret ballot vote was taken at a special meeting of the Union, to authorize the adoption and continuance of this type of special meeting at any time. 1174 employees voted in favor of the continuance and 7 voted in opposition (R. 66, 81, Exhibits 12 and 13). The vote was taken for the purpose of complying with the strike-vote provision of Chapter 111.06 (2) (c), Wisconsin Statutes, in the event the Wisconsin Employment Relations Board should hold that to be necessary (R. 66, Exhibit 12).

The Company was advised during the course of negotiations, and while the stoppages were taking place, that further walkouts would take place if the demands of the union were not met (Finding of Fact 9 at R. 16; R. 40, 49). The Company had taken the position (subsequently rejected by the Wisconsin Board) that the stoppages were in violation of the expired contract, prohibiting strikes until after all grievance procedures had been exhausted. The Union claimed that all grievance procedures had been exhausted (R. 42).

The work stoppages affected production, but this effect was not as great as the effect of one lengthy strike. The

Company admitted that these stoppages by the Union were less costly to it than a full-time continuous strike would have been (R. 43).

Union officials claimed that the stoppages were for the purpose, among other things, of (1) interfering with the production of the Company so as to induce and compel the Company to agree to union demands (including the Directive of the War Labor Board) for inclusion in a collective bargaining agreement which was then in the process of negotiations (R. 47-48); (2) keeping the workers on the payroll, except for the deductions which the Company took for the brief periods of the stoppage, and so avoid the hardship of a protracted strike (R. 46); (3) preventing company-inspired rumors from wrecking the solidarity of the employees and protecting the union's security in the plant (R. 48-49); (4) conveniently getting all members of the union together during the work week rather than on Sundays (R. 88); and (5) putting the Company on the defensive in the collective bargaining process and so to bring economic pressure on the Company to agree to the Directive of the National War Labor Board (R. 47). The meetings were attended by a preponderant majority of those working (R. 49). The officials of the union never tried to name the activities, either by use of the term "strike" or otherwise (R. 45-46).

PROCEEDINGS BELOW.

The Company filed its complaint with the Wisconsin Employment Relations Board charging unfair labor practices by the Union in violation of Chapter 111, Wisconsin Statutes (1945) (R. 25-29). The Petitioners denied the allegation and set up certain constitutional defenses by way of answer (R. 30-32).

After hearing, the Board made findings of fact, conclusions of law, and entered an order, which insofar as is

pertinent here, provided that the union and its officers cease and desist from

“(a) Engaging in concerted efforts to interfere with production by arbitrarily calling union meetings and inducing work stoppages during regularly scheduled working hours or engaging in any other concerted effort to interfere with production of the complainant, except by leaving the premises in an orderly manner for the purpose of going on strike” (R. 17).

Two separate proceedings were begun in the Circuit Court for Milwaukee County: a Petition for Review by the Union (R. 90-94), and a Petition for Enforcement by the Board (R. 12-14). The proceedings were consolidated by stipulation (R. 23).¹

The Circuit Court, in its opinion entered October 18, 1946 ruled that Paragraph (a) of the Board's cease and desist order, quoted above, be vacated, and that the Board's Petition to enforce this portion of the order be denied (R. 1-12). A single judgment was entered accordingly in the Circuit Court on October 30, 1946 (R. 23-25). The Wisconsin Employment Relations Board and the Company appealed from that portion of the judgment vacating part of the Board's order ~~(R. 96)~~. The Union cross-petitioned for review of paragraph (b) of the order (R. 101). The Wisconsin Supreme Court reversed the judgment of the Circuit Court of Milwaukee County, and directed the Circuit Court to enter judgment enforcing the order of the Board (R. 104-105). Motion for rehearing was denied (R. 127).

¹ Under Wisconsin procedure, complaints are filed by the complaining party with the Wisconsin Employment Relations Board, and the Board must proceed to hearing on the complaint [Section 111.97 (2)]. After such hearing it may dismiss the complaint or make such order as it deems appropriate [Section 111.97 (4)]. The order is not self-executing. In order to enforce the order the Board, acting through the Attorney General, applies to the Circuit Court for judgment. Any person aggrieved has the right to apply to the Circuit Court for reversal or modification of such order [Section 111.97 (7) and (8)].

SPECIFICATION OF ERRORS.

The Supreme Court of the State of Wisconsin erred in the following respects:

In reversing the judgment of the Circuit Court for Milwaukee County, Wisconsin, which judgment vacated part of the order of the Wisconsin Employment Relations Board, and in directing entry of judgment enforcing the entire order, paragraph (a) of which, as construed by the Wisconsin Supreme Court, prohibited petitioners from engaging in peaceful work stoppages and attending union meetings during the course of a labor dispute arising out of collective bargaining negotiations; in so doing the Wisconsin Supreme Court committed further error in holding that Sections 111.06 (2) (e), and 111.06 (2) (h) as construed and applied in this case and any judgment or order based thereon were not in violation of Article I, Section 8, and Article VI of, and the Thirteenth and Fourteenth Amendments to, the Constitution of the United States.

SUMMARY OF ARGUMENT.

I.

A. State regulation of the activities of employees in matters involving interstate commerce must yield to the superior federal power if such state regulation results in forfeiture of federally-assured rights or impairs or limits such rights.

B. Section 7 of the National Labor Relations Act recognizes and affirms the historic and constitutional right of working men to form, join or assist labor organizations, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. The activities in the instant case consisted of the leaving of the premises of the employer during working hours in a peaceful and orderly manner, and refusals to report for work. The immediate purpose was to attend union meetings, and to exert economic pressure upon the employer for the ultimate objective of attaining legitimate demands involved in collective bargaining negotiations then in progress. These are concerted activities which are protected under Section 7, and the restraint, therefore, does result in forfeiture of federally-guaranteed rights.

C. The judgment bans such activities not because they are illegal per se, but because of the alleged unlawful purpose to interfere with production. Interference with production, however, is implicit in the exercise of the protected activities and even though such interference with production may have been contemplated or intended, just so long as the ultimate objective is a legal objective, as was the situation here, the activities are not subject to restraint under any alleged police power of the state.

D. Section 111.06 (2) (c) of the statutes, also relied upon to sustain the judgment herein, affords no valid basis for the state's action because of failure to have a majority

of the employees vote by secret ballot to call a strike. The federal guaranties are not subject to such limitations by the state.

E. The restraint also interferes with, impedes or diminishes the right to strike which is guaranteed by Section 13 of the National Labor Relations Act. The activities herein were strike activities within the contemplation of the federal Act, the recent amendments to the federal Act which embody a definition of the term strike, court decisions, and the every day realities of industrial life.

The state cannot by artificial distortion of such term deprive petitioners of the right to strike.

F. Respondents seek to recast the judgment by asserting it only requires the petitioners to make their position and their objective known; that it is based upon an alleged unlawful objective, and that it is based upon an attempt on the part of petitioners to take over unilateral control of working hours. There is no basis in the record, the decision of the state board nor in the decision of the Wisconsin Supreme Court which would justify such rewriting of the judgment, nor would the record sustain such basis for limitation of the judgment's scope.

II.

By the passage of the Labor Management Relations Act of 1947 Congress has expressly pre-empted the field of unlawful conduct on the part of labor unions and employees and has established a comprehensive code for regulation and treatment of such conduct. By Section 10 (a) of the Labor Management Relations Act of 1947 Congress has expressly excluded the state from assuming concurrent jurisdiction over unfair labor practices committed by unions or employees unless the National Labor Relations Board expressly cedes such jurisdiction in cases of predominantly local interest, and where state regulation is not incon-

sistent with the federal regulation. Additionally, by reason of the passage of the Labor Management Relations Act there is present the situation which controlled the decision of this Court in the case of Bethlehem Steel Company v. New York State Labor Relations Board, 330 U. S. 767: each government is regulating the same relationship and has delegated to administrative authorities wide discretion in applying the regulation to specific cases.

III.

A. The judgment imposes involuntary servitude contrary to the Thirteenth Amendment to the Constitution of the United States. To previously restrain a concerted work stoppage if accompanied by an intent to return to work without settlement of the labor dispute imposes involuntary servitude, and limitations on a basic right.

B. The limitation on the right to induce work stoppages and to call union meetings is in violation of the Fourteenth Amendment to the Constitution of the United States, since the activities in their aggregate are the exercise of the basic civil liberty to strengthen employment rights and economic opportunities by combining with fellow workmen, and such activities embrace free speech and public assemblage.

IV.

Aside from its invalidity for the other reasons previously set forth, Section 111.06 (2) (e), in conditioning the right to engage in concerted activities on majority approval by secret ballot, imposes unreasonable classification in violation of the due process and equal protection clause of the Fourteenth Amendment. The classification has no basis in law since it applies to all businesses and all circumstances without qualification and without regard to "clear and present danger" or any other interest of the state which may be placed in jeopardy by minority refusals to work, or the absence of a secret ballot.

ARGUMENT.

I.

The Judgment and Statute as Construed and Applied by the Wisconsin Supreme Court in This Case Are in Derogation of Rights Secured to the Petitioners by Federal Law and Are, Therefore, Unconstitutional and Void Because in Violation of Article I, Section 8, and Article VI of the Constitution of the United States.

The question of whether the State's action in this case was in conflict with the National Labor Relations Act (49 Stat. 449, 29 U. S. Code, Par. 151, et seq.) was raised and argued at each stage of the proceedings (R. 30, 21, 90). This question was directly passed upon by the State Supreme Court (Court's opinion at R. 117, 119, 121).

The issue, therefore, is directly before this Court for determination.

A. The general principle involved: State regulation resulting in deprivation of rights under Federal regulation must yield to the superior Federal power.

The general principle of law, flowing from Article I, Section 8, and Article VI of the Constitution of the United States, that conflicting state law must yield to superior Federal law in matters involving interstate commerce, was particularized in labor relations matters in the case of **Allen-Bradley, Local 1111, et al. v. Wisconsin Employment Relations Board et al.**, 315 U. S. 740. In that case this Court had before it a challenge to the Wisconsin Employment Relations Act, Chapter 111, Wis. Stats., 1939. The challenge there was similar to the challenge herein made to certain sections of that law; but inasmuch as the

attack in the **Allen-Bradley** case, *supra*, was on the law as a whole and grew out of an injunction which classically fell within the police power of the state, that is, prohibition of mass picketing and other manifestations of force against the peace and dignity of the state, the challenge was rejected, because it was not shown "that freedom to engage in such conduct" was "so essential or intimately related to a realization of the guaranties of the Federal Act that its denial is an impairment of the Federal policy". This court, however, was careful to point out (at p. 750) that although there was no merit to the claim of Federal supremacy on the facts therein presented, the answer would be clearly different if the Wisconsin Act had been or were so construed, that "• • • it impairs, dilutes, qualifies or in any way subtracts from any of the rights guaranteed and protected by the Federal Act," or that employees have been "• • • deprived of rights protected or granted by the Federal Act."

Subsequently, in **Hill v. Florida**, 325 U. S. 538, this principle was applied in declaring a state statute invalid under the Commerce clause of the Constitution because such statute required a collective bargaining representative to be licensed by the state as a prerequisite to the right to act as such representative, whereas the Federal Act imposed no such restriction.

It is upon the principles set forth in the above and related cases that petitioners rely.

That this principle of Federal supremacy may be properly invoked in this case on the basis of involvement of interstate commerce within the meaning of the National Labor Relations Act is established by the stipulation between the parties (R. 43), and the fact that the National Labor Relations Board had previously exercised its juris-

diction over the relationship between the company and the employees and certified the petitioning union as the collective bargaining agent for such employees (R. 33, 40).

B. The restrained activities in the instant case are protected activities under Section 7 of the National Labor Relations Act.

Section 7 of the National Labor Relations Act, *supra*, in the form in which it appeared during the period of time of the work stoppages with which this case is concerned (November, 1945 through May, 1946) provided that

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."²

The statutory language above set forth embodied congressional recognition of an historic right of constitutional rank.

This right was clearly recognized and delineated in the case of **American Steel Foundries v. Tri-City Central Trades Council**, 257 U. S. 184, 209, some fourteen years before the enactment of the National Labor Relations Act:

"They (labor organizations) were organized out of the necessities of the situation. A single employee

² Subsequent amendment has added the following language to Section 7, "and shall also have the right to refrain from any and all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3)." Public Law 101, 80th Congress, June 23, 1947, hereinafter referred to as the Labor Management Relations Act. This addition does not affect the quoted language as applicable to this case. Similar language in the Wisconsin Statutes was the basis for paragraph (b) of the order, which is not involved in these proceedings. The union activities in this case were carried off by virtually all employees in the collective bargaining unit (R. 16).

was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers an opportunity to deal on equality with their employer. They united to exert influence upon him and to leave him in a body, in order, by this inconvenience, to induce him to make better terms with them. They were withholding their labor of economic value to make him pay what they thought it was worth. The right to combine for such a lawful purpose, has, in many years, not been denied by any court. The strike became a lawful instrument in a lawful economic struggle. * * *"

Similarly, this Court in sustaining the constitutionality of the National Labor Relations Act in the case of **National Labor Relations Board v. Jones and Laughlin Steel Corporation**, 301 U. S. 1, referred to the **American Steel Foundries Case**, *supra*, and the case of **Texas and New Orleans Railway Company v. Railway and Steamship Clerks**, 281 U. S. 548, summarizing their import as follows (p. 34): .

"Fully recognizing the legality of collective action on the part of employees in order to safeguard their proper interests, we said that Congress was not required to ignore this right but could safeguard it."

This recognition of the right of employees to engage in concerted activities for their mutual aid and protection has now become so firmly a part of our jurisprudence, both by statute and by court decision that present day litigation concerns itself only with the question of what concerted activities are so protected, and to what ultimate objective they may be directed.

In the instant case, the activities of the petitioners (as set forth in the record herein, the Findings of Fact of the Wisconsin Employment Relations Board, and the decision of the Wisconsin Supreme Court), consisted of employees concerted leaving their employment or concerted refusing to report for work for the stated purpose of attending union meeting.³ This was done without the consent of the company, and at the instigation of the officers and members of the Bargaining Committee. The purpose was to interfere with the production of the company, and by "such interference to induce and compel the complainant to accede to the demands of the union to be included in the collective bargaining agreement being negotiated between the parties" (R. 16). And the union and the individual petitioners had publicly stated " * * * their intent and purpose to engage in work stoppages similar to the stoppages engaged in * * * for the purpose of inducing and coercing the complainant into compliance with their demands" (R. 16). (See also Board's Memorandum at R. 19 and R. 21).

The contract between the parties had expired and therefore, was no contractual restriction on the right to strike (R. 15). Collective bargaining was in process to fix the terms of a new contract (R. 19).

Obviously, and on the face of it, we then have here the type of concerted activity which falls within the protection of the National Labor Relations Act, both as to its nature and its objective. This brings us to consideration of the statutory enactments which Wisconsin claims afford valid basis for restraint of the activities.

³ There were some isolated instances of property damage and threats, by "persons unidentified." These were separately treated by the Board in paragraph (b) of the Order (R. 17). There is no claim made by Respondents that paragraph (a) depends in any way for its justification on paragraph (b), nor did the Wisconsin Board or the Wisconsin Court look upon those activities as being involved in paragraph (a). Although petitioners challenged paragraph (b) in the Court below, they do not ask this Court to review this portion of the Order, nor was it a basis for the Petition for Writ of Certiorari.

C. Section 111.06 (2) (h) as construed and applied in this case affords no valid basis for limitation of the protected right, and is, therefore, unconstitutional.

The Wisconsin Employment Relations Board based its Order squarely upon the provisions of Section 111.06 (2) (h) of the Wisconsin Statutes which reads as follows:

“It shall be an unfair labor practice for an employee individually or in concert with others: * * *

“(h) To take unauthorized possession of property of the employer or to engage in any concerted effort to interfere with production except by leaving the premises in an orderly manner for the purpose of going on strike.”

The Conclusion of Law and the Order of the Wisconsin Employment Relations Board follow the statutory language (R. 17-18), and the Wisconsin Board in its memorandum opinion expressly discusses and relies upon the above quoted provisions (R. 18-21).

The Wisconsin Supreme Court similarly sustained the validity of the Order under this section of the statutes.

Section 111.06 (2) (h) was manifestly designed to prevent taking “unauthorized possession of the property of the employer” except by “leaving the premises in an orderly manner.” It was undoubtedly aimed at the “sit-down” strike which had dramatically manifested itself prior to the time of the passage of the Wisconsin law (May, 1939). See **N. L. R. B. v. Fansteel Metallurgical Corp.**, 306 U. S. 240. This was the view of the statute taken by the Circuit Court for Milwaukee County (R. 1-12), and by the three dissenting Wisconsin Supreme Court Justices (R. 123-125).

However, since this case clearly did not involve a “sit-down” or anything else approaching the taking of

"unauthorized possession," the majority of the Wisconsin Court shifted its emphasis to other language contained in Section 111.06 (2) (h).

In setting forth the statutes which it considered "applicable and material to the instant case" the Wisconsin Court quoted Section 111.06 (2) (h) as follows:

"(h) * * * to engage in any concerted effort to interfere with production except by leaving the premises in an orderly manner for the purpose of going on strike" (Court's decision at R. 110).

The "unauthorized possession" part of the statute was therefore expressly eliminated from the case by the Wisconsin Court. The Wisconsin Board had similarly based its Order on the "interference with production" part of the statute. [See Board's Memorandum at p. 21 and its Conclusion of Law 1 (a) at R. 17.]

In treating the case under this limited reading of the section, the Wisconsin Board and the Wisconsin Court had before them the conceded result of "interfering with production" and the disputed element of whether these activities were strikes. Their decision was based upon their conclusion that the activities were not "strikes" under Wisconsin law. The holding of "unlawfulness" therefore followed.

Whether or not the involved activities are "strikes" under Wisconsin law may be for the Wisconsin Court to determine. Whether they are "strikes" under the national law of course raises a federal question to be determined by the appropriate federal agencies and courts. This point will be discussed later herein (pages 32-38, *infra*). For the purposes of this argument, the label to be attached to the activities becomes immaterial. What is material is whether these activities and the objects to which they were addressed are protected by federal law.

The nature of the activities is set forth in the Statement of the Case (pages 4 to 7 hereof) and summarized briefly above. That they were concerted activities for mutual aid and protection and to attain collective bargaining demands is undisputed.

There, therefore, remains for consideration whether these concerted activities otherwise protected by the National Labor Relations Act can, nevertheless, be validly restrained under the Wisconsin scheme of regulation.

1. The activities in and of themselves were not declared to be unlawful. The unlawfulness was found in their purpose to interfere with production.

It is to be noted at the outset that the activities **in and of themselves** were not declared unlawful by the Wisconsin Court or the Wisconsin Board. As pointed out above, the Court considered only that part of Section 111.06 (2) (h) which makes "interference with production" unlawful except in the case of a state-defined strike. Having found that the activities were not strikes, and that they were for the purpose of interfering with production, they were restrained. The frequency of the activities, the times at which they occurred, and their duration were considered only by the Court in connection with whether they could be labeled strikes within the excepting proviso to the statute. The Court held that although these activities were "concomitants of a strike". (Decision at R. 110) and although the "greater quitting of work involved in strikes includes the lesser quitting here involved" (Decision at R. 115) such activities nevertheless were not "strikes." However, nowhere in the Court's opinion is there any holding, direct or otherwise, that the activities in and of themselves were unlawful if they were not coupled with the "unlawful purpose" set forth in the statute to "interfere with production."

The Wisconsin Court refers throughout its opinion to "stoppage of work," "walking out," "refraining from work," "walk out," "leaving the premises," "engaging in concerted effort," "quitting," and "remaining away from work" as being the type of activities involved. And the Court emphasizes that their unlawfulness lies in their **purpose**. This is demonstrated by the following language of the opinion:

"The quitting and remaining away from work in the instant case was done pursuant to a conspiracy to carry out an unlawful plan" (R. 114).

"The order bans continuance of the acts involved for the unlawful purpose of interfering with production in the situation instantly involved" (R. 116).

"That only 'concerted activities' to secure a lawful objective are protected is held in, etc. * * *" (R. 120).

Nor did the Wisconsin Board declare the activities per se unlawful. It too based its Order on the purpose of the activity, saying:

"There can be no question but what continuous work stoppages engaged in during regularly scheduled working hours constitute an interference with production and thus falls directly within the terms of the section of the statutes above quoted" (R. 21).

As a matter of fact, the only provision of the Wisconsin Statutes which deals with the **nature** of union activities, as distinguished from the **purpose**, is Section 111.02 (2) (f) relating to mass-picketing threats, intimidation, obstruction of streets and highways, etc. This section was not a basis for the order. Therefore, despite the emphasis placed by respondents on the **nature** of the activities, all that is involved in this case is the question of whether the state may restrain peaceful, concerted activities directed to attainment of legitimate collective bargaining demands, even though there is a resulting interference with production.

- 2. *The purpose of the activities was to attain legitimate collective bargaining demands, a purpose which is fostered and protected by the National Labor Relations Act.*

In sustaining the Wisconsin Board's Order under Section 111.06 (2) (h) of the Statutes, the Wisconsin Supreme Court disposed of petitioners' argument (that the Order and Statute as so construed invaded their federal rights) by holding that, "only 'converted activities' to secure a lawful objective is protected" (R. 120).

However, in the instant case the only unlawful objective found by the Court is " * * * the unlawful purpose of interfering with production in the situation instantly involved" (R. 116).

We then have here an attempted abridgement of the federally-recognized right of concerted activity on the ground that since such activity had the immediate result of interfering with production, it may be validly restrained.

But the interference with production here was admittedly for the ultimate purpose of inducing and compelling the employer, "to accede to the demands of the unions to be included in the collective bargaining agreement being negotiated between the parties," (R. 16) the very purpose to which such concerted activities are normally and usually directed.

"The truth to be dealt with is that every measure upon which a labor union relies for acceptance of its demands, involves the curtailment of some temporal interest of employer, non-union employee and frequently the public:

• • • • •
"When the objectives of concerted action are higher wages, shorter hours and improved working conditions,

all measures in themselves not tortious may be employed. Here the benefit to workers is direct and obvious, and the right to combine for such purposes is universally recognized." Frankfurter and Greene, *The Labor Injunction* (1930), pp. 24, 26.

In the case of **American Steel Foundries v. Tri-City Central Trades Council**, *supra*, it was recognized that working men withheld their labor " * * * in order, by this inconvenience, to induce him (the employer) to make better terms with them."

And in **National Labor Relations Board v. Fansteel Metallurgical Corp.**, *supra*, in distinguishing between lawful and unlawful activities, this Court pointed out (at p. 256) that the violent and lawless conduct therein involved " * * * was not a mere quitting of work and statement of grievances in the exercise of pressure recognized as lawful."

Surely there can be no doubt that the "inconvenience" and "pressure" referred to by this Court must necessarily include "interference with production." In fact the Wisconsin Board itself referred to these activities as "economic pressure on the employer in an attempt to compel the employer to accede to requests made by the Union" (Memorandum, R. 19).

Similarly, in **Apex Hosiery Company v. Leader**, 310 U. S. 469, in holding that although strikes or agreements not to work must of necessity cause some injury to employers they nevertheless were not in violation of the Sherman Act, it was pointed out, in Footnote 24 to the decision (p. 504), that other federal legislation aimed at protecting labor organizations support the conclusion that Congress did not regard the effects from such combinations as against public policy. The National Labor Relations Act

was cited as one such enactment, the Act being described as one which "recognizes the strike as a proper union weapon". See also **U. S. v. Hutcheson**, 312 U. S. 219.

In similar vein and import, although involving the right to peacefully picket rather than the right to strike, or to engage in concerted withholding of services, this Court held, in the case of **Thornhill v. Alabama**, 310 U. S. 88, that danger of injury to an industrial concern was neither so imminent nor so serious as to justify the anti-picketing statute therein involved; and further held, in the case of **A. F. of L. v. Swing**, 312 U. S. 321, that concern for the economic interests against which working men were seeking to enlist public opinion was not a basis for barring their right of communication.

In **Senn v. Tile Layers Union**, 301 U. S. 468 this Court distinguished between a malicious desire to injure and an action taken to protect labor's legitimate self-interest, even though injurious to the employer.

And although the Wisconsin Court relied upon the decision of Justice Holmes in **Aikens v. Wisconsin**, 195 U. S. 194, as somehow supporting its decision, the Court apparently overlooked Justice Holmes' holding in that case that the statute there involved was sustainable because applied to activities which were done "malevolently for the sake of the harm as an end in itself," rather than "merely as a means to some further end legitimately desired."⁴

See also **Restatement of the Law of Torts, Volume IV, Pages 101-104.**

⁴ If the Wisconsin Court by its finding meant to hold that the activities herein involved were for the sole and malicious purpose of interfering with production without relationship to the collective bargaining that was then going on, and in complete disregard of the Wisconsin Board's findings, adopted by it, that the purpose was to compel compliance with collective bargaining demands, then it is a "spurious finding" or an "insubstantial finding(s) of fact screening reality," and is entitled to no consideration. **Milk Wagon Drivers' Union v. Meadowmoor Dairies, Inc.**, 312 U. S. 287.

Also pertinent to the question of whether the Federal policy expressed by the National Labor Relations Act recognizes the right to engage in concerted activities which are purposed to interfere with production where collective bargaining is in progress is the provision of Section 2 (9) incorporating the definition of "labor dispute" which is found in the Norris-LaGuardia Act, 47 Stat. 71. The history of this provision of the Norris-LaGuardia Act was recently summarized in the case of **Allen-Bradley Co. v. Local Union No. 3, I. B. E. W.**, 325 U. S. 797, 805, in which case it was pointed out by the Court that the Norris-LaGuardia Act "emphasized the public importance under modern economic conditions of protecting the rights of employees to . . . engage in 'concerted activities for the purpose of collective bargaining or other mutual aid and protection'. This Congressional purpose found further expression in the Wagner Act, 49 Stat. 449."

That the activities herein involved grew out of a "controversy concerning terms, tenure or conditions of employment" is not subject to dispute and admitted in the record. During the course of such activities, therefore, the employees retain their status as employees under the definition contained in Section 2 (3) of the Act, and are entitled to the full protection of the Act regardless of "the wisdom or unwisdom of the men, their justification or lack of it." **N. L. R. B. v. Mackay Radio and Telegraph Company**, 304 U. S. 333.

Can it be said that the protection afforded to employees against discriminatory action by the employer may be put to naught by the State through the method herein devised? Can it be said that the state may do more than that which the law permits the employer to do—subject the employees to contempt proceedings for activities which cannot be made the basis for discharge?

The Wisconsin Court fails to recognize the historic fact that the national legislation incorporated, codified and gave congressional support to the prevailing common-law theory that the presence of "just cause" is tantamount to proof of "no malice". This principle was early enunciated by the English Courts in **Mogul Steamship Company v. McGregor**, L. R. 23, Q. B. Div. 598 (1889) and adopted in this country in a long string of cases, outstanding among which is the **American Steel Foundries Case**, supra. It will be recalled that this principle first received its greatest impetus in this country in the dissenting opinion of Justice Holmes, in the case of **Vege-lahn v. Guntner**, 167 Mass. 92, 105-106, 44 N. E. 1077 (1896); following his earlier elaboration in "Privilege, Malice, and Intent", 8 Harvard Law Review 1 (1894).

When Congress reaffirmed the right of employees to engage in concerted activities and to strike, it surely had no intention of abandoning those principles which had become so firmly a part of our jurisprudence. The intent was clearly to the contrary.

Conclusive on the point should be the fact that recent legislation has defined the term "strike" as including "concerted interruption of operations by employees." Labor Management Relations Act, supra, Sect. 502. This demonstrates that "interference with production" was within and still remains within the contemplation of the Congress in establishing the national policy.

3. Conclusion and summary on the constitutionality of Section 111.06 (2) (b) and the judgment based thereon.

The simple facts of this case are that a labor union and its members which under the law of Wisconsin are one and the same, **Hromek v. Frei Gemeinde**, 238 Wis. 204, 209, 298 S.W. 587, withheld their services in a peaceful and

orderly manner for short periods of time and at irregular intervals to achieve some measure of collective strength for the purpose of attaining their legitimate objective. This is a right firmly protected under Section 7 of the National Labor Relations Act. It is submitted the State cannot by any subterfuge or device or any claimed exercise of its police power validly restrain such activities.

Should the State be permitted to "impair or dilute such rights" which are so "essential or intimately related to a realization of the guarantee of the federal Act that (its) denial is an impairment of the federal policy." (**Allen-Bradley Local No. 1111 v. W. E. R. B.**, supra) by the expedient of saying that such rights may be denied where there is an interference with production then indeed the federal law and policy are meaningless.

The concerted activities in this case were legal under federal law. Nor were they, per se, illegal under state law. There was not present any of those elements which have, at times, resulted in some qualification on the enforcement of the right because of attendant circumstances.

There was no violence, no breach of the peace; no obstructing of ingress or egress, no usurpation of property or property rights, no violation of contract obligations. There was no boycott, secondary or otherwise, no combination with other groups, labor or non-labor, to effect the ultimate goal.

The means were as old as labor's struggle for existence.

The objective was admitted and unquestioned: To compel compliance with an order of an agency of the Government of the United States namely, the National War Labor Board, and to compel compliance with collective bargaining demands.

An intended result of the use of the legitimate means to attain such lawful ends, was interference with the employer's production—a normal, natural and contemplated result of the exercise of concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Yet the State of Wisconsin asserts that unless the means fall within Wisconsin's definition of a strike, and regardless of the fact that they are concerted activities not otherwise defined or found to be unlawful, they are subject to restraint if their purpose is to interfere with production even though "by such interference (petitioner's purpose was) to induce and compel the complainant to accede to the demands of the Union to be included in the collective bargaining agreement being negotiated between the parties" (R. 120).

To sustain such judgment, and the statute as so construed, is to put within the power of any state the means of completely destroying the historic rights of the working man as finally codified by the National Labor Relations Act. It would indeed be a mockery to say that while concerted activities for mutual aid and protection and for the purpose of collective bargaining are protected by national law, the right to engage in such activities shall be forfeited by state declaration that they become unlawful when they interfere with the production of a private employer.

It is, therefore, respectfully submitted that Section 111.06 (2) (h) and the judgment based thereon, as construed and applied by the Wisconsin Court in this case, are unconstitutional and void, and have no effect whatsoever because contrary to the paramount federal law (set forth in the National Labor Relations Act) in violation of Article I, Section 8 and Article VI of the Constitution of the United States.

D. Section 111.06 (2) (e) as construed and applied in this case affords no valid basis for limitation of the protected right, and is, therefore, unconstitutional.

Section 111.06 (2) (e) of the Wisconsin Statutes, as set forth by the Wisconsin Supreme Court as being applicable herein (Decision R. 110), provides as follows:

“It shall be an unfair labor practice for an employee individually or in concert with others:

“(e) To cooperate in engaging in (or) promoting
* * * any * * * overt act concomitant of a strike unless a majority in a collective bargaining unit of the employees of an employer against whom such acts are primarily directed have voted by secret ballot to call a strike.”⁵

The Wisconsin Supreme Court in applying Section 111.06 (2) (e) held that the activities herein involved though not actual strikes under its definition of the term were, nevertheless, “overt concomitants of a strike,” and as such required a prior license by a majority of the employees voting by secret ballot to call a strike.⁶

⁵ In the State's Brief opposing Certiorari, at page 28, the State now claims that the Order instantly involved was not based upon this section of the statute—that the Wisconsin Court merely construed such section, but that no prohibition in the Order was based thereon. This is contrary to the previous position taken by the State, since it was urged in the court below that if the construction of Section 111.06 (2) (h) by the State Board should be rejected by the Wisconsin Supreme Court, particularly on the question of whether the activities involved were strikes or a strike under Wisconsin law, then the Order could, nevertheless, be supported on the alternative ground of violation of Section 111.06 (2) (e) although the Wisconsin Board had not based its Order on such section. The Wisconsin Court accepted both theories, and its decision is squarely bottomed on 111.06 (2) (e) as well as on 111.06 (2) (h). (Decision at R. 110.)

⁶ The Wisconsin Court completely ignored the undisputed fact that the members of the Union at a specially called meeting did vote by secret ballot, 1174 to 7, to authorize the continuance of these activities, which vote was expressly taken to comply with the requirements of Chapter 111.06 (2) (e) in the event that the Wisconsin Employment Relations Board in the then pending and instant proceeding held that to be necessary (R. 66; Ex. 12 and Ex. 13, Tally of Ballots [not printed]). The only possible explanation for the Court's holding in face of the uncontradicted and undisputed record, undoubtedly lies in the fact that the word “strike” was not used in submitting the vote to the membership.

But the federally guaranteed rights embodied in Section 7 and Section 13 of the national Act cannot be whittled away by the state so as to make the exercise of such rights dependent upon majority vote or approval by secret ballot. No such limitation can be found in the federal Act. The guaranties of the Act extend to minority groups as well as to majority groups. **Yoerg Brewing Co. v. Brennan**, 59 F. Supp. 625; **American Chain and Cable Co., Inc. v. Truck Drivers & Helpers Union**, 68 F. Supp. 54; **Western Cartridge Co. v. N. L. R. B.**, 139 F. (2d) 855, 858 (C. C. A. 7th, 1943); **In re Republic Steel Corporation**, 62 N. L. R. B. 1008 (1945). Their rights are not subject to prior licensing. **Hill v. Alabama**, *supra*.

In **N. L. R. B. v. Reed & Prince Manufacturing Company**, 118 Fed. (2) 874 (C. C. A. 1st, 1941), cert. denied 313 U. S. 595 (1941), it was held that the National Labor Relations Board could, in its discretion, extend the protection of the Act together with remedial relief to strikers who sought to compel an employer to sign a contract unlawful under state law.

And in the case of **N. L. R. B. v. Hearst Publications, Inc.**, 322 U. S. 111, 123 (1944), this Court pointed out that to interpret the National Labor Relations Act on the basis of State law "would introduce variations into the statute's operations as wide as the differences the forty-eight states and other local jurisdictions make. * * * Both the terms and the purposes of the statute, as well as the legislative history, show that Congress had in mind no such patch-work plan for securing freedom of employees' organization and of collective bargaining."

Application of this same principle is demonstrated by the holding that the right to strike assured by the national Act cannot be taken away by state legislation which conditions such right by the requirement of a "cooling off" period. **Hamilton v. N. L. R. B.**, 160 F. (2) 465 (C. C. A.

6th, 1947), cert. denied sub nom. **Kalamazoo Stationery Co. v. N. L. R. B.**, 332 U. S. 152 (Oct. 1947).

It is submitted that mere failure of technical compliance with the state's requirement of a secret ballot majority vote by a union certified by the National Labor Relations Board, representing virtually all employees affected and acting pursuant to the mandates of an overwhelming majority of the employees, provides no basis for deprivation or restraint of the federally guaranteed rights.⁷

E. The activities are also protected under Section 13 of the Federal Act. They were strikes both in fact and in law.

Section 13 of the National Labor Relations Act at the time of the activity here in question provided as follows:

“Nothing in this act shall be construed so as to interfere with or impede or diminish in any way the right to strike.”

This language is more than a rule of construction. It is the flat recognition of the right to strike as pointed out in the case of **N. L. R. B. v. Fansteel Metallurgical Corporation**, supra, wherein it was stated (p. 256),

“Congress also recognized the right to strike—that the employees could lawfully cease work at their own volition because of the failure of the employer to meet their demands. Section 13 provides that nothing in the Act * * * shall be construed so as to inter-

⁷ Section 111.06 (2) (e) is further subject to attack, as applied in this case, on the additional grounds which were previously presented to this Court in the case of **Hotel & Restaurant Employees' International Alliance v. Wisconsin Employment Relations Board**, 315 U. S. 437 (1942), but which were not there considered because of this Court's conclusion that the Wisconsin Court's decision in that case was not, in fact, based upon Section 111.06 (2) (e), but on the acts of violence. These other grounds of attack are set forth later herein at pages 115 to 125.

fere with or impede or diminish in any way the right to strike'. But this recognition of 'the right to strike' plainly contemplates a lawful strike—the exercise of the unquestioned right to quit work. * * *

Wisconsin here has denied that right by interpreting the word "strike" so narrowly so as to exclude the activities herein involved from such definition.⁸

And while this Court is bound by the interpretation or construction of the Wisconsin Statutes placed upon it by the highest judicial authority of that State, it is not so bound in ascertaining the meaning of the word "strike" under federal law, nor in protecting fundamental rights.

"The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the Constitution." **Mugler v. Kansas**, 123 U. S. 623, 661 (1887).

The National Labor Relations Act at the time of the activities herein involved did not contain a definition of the word "strike." However, the National Labor Relations Board which had the duty under the Act of construing and applying the Statute in the first instance has held

⁸ It was necessary for the Wisconsin Court to rule on the question of whether the activities were a strike since under the state law the question of whether petitioners had committed an unfair labor practice under Section 111.06 (2) (h) was dependent on whether their activities were or were not strikes within the excepting proviso of that section.

in the following cases that activities, similar in form and content to the activities herein involved, were protected strike activities under the national Act, as well as concerted activities within the contemplation of Section 7:

Massey Gin and Machine Works, Inc., 78 N. L. R. B. No. (July, 1948) (walkout without previous announcement of intention to strike and unaccompanied by picketing held "no less a strike because the group may not have labeled it a strike, or engaged in the additional activities which usually accompany a strike"); **Spencer Auto Electric, Inc.**, 73 N. L. R. B. 1416 (walkout held strike even though not preceded by demand); **Niles Firebrick Co.**, 30 N. L. R. B. 426, enforced 124 F. (2) 366, ~~cert denied 316 U. S. 684~~ (refusal to take a job "while not a total strike" held a "partial strike"); **Harnischfeger Corporation**, 9 N. L. R. B. 676 (refusals to work overtime held "partial strike"); **American Manufacturing Concern**, 7 N. L. R. B. 753 (walkouts followed by returns to work held strikes even if not considered as such by employees).

In addition to these Board and Court decisions under the national Act, we now have the benefit of Congressional definition of the term "strike":

"Sec. 501 (2). The term strike includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective bargaining agreement) and any concerted slowdown or concerted interruption of operation by employees" (Labor Management Relations Act, supra).

It will be noted that this Congressional definition of the term, as distinguished from the Wisconsin Court's definition, or any other limiting definition, has made it clear that **any** concerted stoppage of work or interruption of operations by employees comes within the meaning of the

term "strike." This definition refers to any stoppage, whether long or short, and does not embrace any time limitation nor test of "success" or "abandonment."

Under the amended National Labor Relations Act of 1947 the right to strike, under the circumstances here involved, is still undiminished even though the Act now defines unfair labor practices of labor unions and provides for means of prevention of such unfair labor practices by the National Labor Relations Board.⁹

The positive declaration by the Congress of the United States of what is included in the term "strike," when taken together with the fact that in defining unfair labor practices on the part of labor unions the right to do that which was done here was not in any way curbed or modified, demonstrates clearly that Congress reaffirmed in the present law the rights ascribed to the petitioners under the old law.

In view of these circumstances, Wisconsin's distortion of what is meant by the word "strike" within the meaning of Section 111.06 (2) (h) becomes material on this appeal. Under guise of this interpretation Wisconsin has sought to limit federally-guaranteed rights. Since this Court has the ultimate authority to scrutinize the record so as to prevent the derogation of constitutional rights by methods such as this (**Milk Wagon Drivers' Union, Local**

⁹ The original Section 13 has been amended to read as follows:

"Section 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." (Amendment emphasized.)

This modifying language was added because of the provisions of Section 8 (b) of the new law which imposes limitations or qualifications on the right to strike, none of which limitations or qualifications apply to the type of activities herein involved.

See statements of Senator Taft, one of the sponsors of the Act, at 93 Cong. Rec. 3950, 3951 (1947), emphasizing that the Act "recognizes freedom to strike when the question involved is the improvement of wages, hours, and working conditions, when a contract has expired and neither side is bound by a contract."

723, v. Meadowmoor Dairies, Inc., 312 U. S. 287, 293), the Wisconsin Court's unrealistic definition requires discussion, lest we fall victims to the "tyranny of labels" (Cardozo, J., in **Palko v. Connecticut**, 302 U. S. 319, 323).

It is clear that the failure of petitioners to name these activities a "strike" has no relevance to the issue of whether they are strikes or not. (See cases cited supra, at page 33.) And it is apparent from the record that although petitioners had not tried to name the activities, they recognized there was nothing new about the work-time stoppages, and that the purpose of the activities was to stave off a full-time strike because of the hardship of having working men out on the street for long periods of time (R. 45-47). The employer conceded that this type of stoppage was less injurious to it than a full-time strike would be (R. 43).

Any definition of the term "strike" embraces four elements: (1) A leaving of employment; (2) by mutual understanding; (3) by a body of workmen; (4) to enforce compliance with demands made on an employer. **N. L. R. B. v. Carlisle Lumber Co.**, 94 F. (2d) 138, 145 (C. C. A. 9th, 1937); **Iron Moulders Union v. Allis-Chalmers**, 166 F. 46 (C. C. A. 6th, 1908); **Michaelson v. U. S.**, 291 F. 940 (C. C. A. 7th, 1923); **Webster's International Dictionary**, Second Edition, Unabridged, 1944.

It is undisputed that the stoppages were by a body of workmen for the purpose of enforcing the collective bargaining demands made upon the employer by the union. There can be no question that demands were made prior to the time of the stoppages since negotiations were in progress with respect to these demands, and since the Wisconsin Employment Relations Board did so find in its Finding of Fact No. 8, quoted earlier (R. 16).

It is difficult to extract from the state court's opinion the reasoning upon which it based its conclusion that these were not strikes, but apparently it is bottomed on the Court's holding that the withdrawing from employment which characterizes a strike "implies something more than the temporary quitting with intent to resume commencement of work on the next shift." It is then stated that such withdrawal "implies a continuous withdrawal until the object of the strike is attained or the strike abandoned," and it is further stated that there must be a "continuance of unemployment" (Decision at R. 112-113).

By these attempted qualifications the Wisconsin Court has in effect said this:

If working men concertedly leave their employment to attain collective bargaining demands, and agreement is reached with their employer prior to their return to work they were striking; if they did not reach agreement, completely abandoned their demands, and returned to work they were striking; but if they did not reach agreement, and, nevertheless, returned to work resolved to concertedly withdraw another day and to repeat the process, if necessary, until agreement is reached then neither the first nor any subsequent stoppage nor all together, even if ultimately successful, were strikes!

The last referred to situation is the situation here, of course, excepting that by virtue of the restraint imposed by Wisconsin, the employees have been prohibited from continuing their activities until success or compromise. The employees here hoped that one temporary withdrawal would be sufficient to gain an agreement. They were prepared, however, to engage in a series of withdrawals, if necessary, to attain this end. The company was so advised (R. 40, 49).

There was, therefore, present here the two necessary intents which distinguish a strike from either an absolute quit or a temporary quit unrelated to a labor dispute; (a) an intention to resume employment, and (b) a purpose to ultimately gain a satisfactory collective bargaining agreement.

There was here the same type of unemployment each time the employees concertedly withdrew or concertedly refused to report to work as there is in any strike, but the length of the unemployment was shorter, the consequent embarrassment to the employer was less, and the periods occurred with greater frequency.

Realistically speaking, the Wisconsin Court's qualification of **continuous unemployment** until the demands are either met or abandoned was present in this case since here was a refusal of **continuous, uninterrupted employment**, until the demands were attained or compromised.

And testing each stoppage individually, the activities here involved were strikes even under the Wisconsin definition. It is absurd to assume, in the face of the record here, that it was not contemplated, as to each stoppage, that such stoppage would be terminated at any time that agreement would be reached **prior** to its intended terminal point, or that it would be the **last** stoppage if the employer yielded and signed an agreement. The employees were prepared to stay out of employment for only a stated period of time, even if their demands were not met, but they were also prepared to terminate the stoppage or the entire series of stoppages and to resume uninterrupted employment upon the meeting of their demands if such contingency took place before the stated period of time or at the conclusion of any one such strike in the series. So there was present here the basic intent, not only as to the whole series of stoppages, but as to each individual

stoppage, to return to work earlier, upon ~~granting~~ of the demands or the signing of an agreement.

Bearing in mind that there was here present a continuing labor dispute over the terms and conditions of a collective bargaining agreement, the activities herein, considered severally or as a whole, were a strike or strikes, both under definition of the federal Act and cases and the every-day realities of industrial life.

We have treated the rights of employees under Sections 7 and 13 separately because of the Wisconsin Court's peculiar approach to what is or is not a strike. Both sections should really be considered together since Section 13 is a reaffirmation of one of the specific rights secured by Section 7, and additionally, is a caution against any interpretation of the Act which may result in any limitation on the right to strike. But, labels aside, all that is involved here is a concerted activity for mutual aid and protection, and in furtherance of legitimate collective bargaining demands. It is, therefore, respectfully submitted that these concerted activities, considered individually or in series, and having been engaged in for the purposes of attaining collective bargaining demands, are within the protection of the National Labor Relations Act, and accordingly, not subject to restraint by the State.

F. Brief answer to contentions of respondents.

The respondents, in opposing the granting of a Writ of Certiorari herein, sought to minimize the scope and significance of the Board's order and the direction for judgment enforcing the same. Anticipating that respondents' briefs will follow, in the main, this attempted justification of the judgment, we shall answer it briefly herein, and so avoid, if possible, the necessity of burdening the Court with a reply brief.

1. *Answer to respondents' argument that the order only requires that petitioners make their position and their objective known.*

It is urged by the respondents that the order is based principally upon the fact that the union did not make its position clear at the outset, and that strikes or concerted activities to be permissible must be preceded by an announcement of their purposes. As we have already pointed out, the fact is, as found by both the Wisconsin Board and the Wisconsin Court, the union did make known its objectives by public statements that the activities would be continued until there was compliance with its demands (R. 16). A representative of the Company testified that he was advised that these concerted activities would continue if the demands of the union were not met (R. 40, 49). To say that the Company was unaware of what those demands were is to belie the conceded fact that collective bargaining was in progress and there were many issues in dispute, including the failure of the Company to comply with the Directive of the National War Labor Board and the additional wage demands made after V-J day (R. 19, 34, 35, 43).

Petitioners would gladly accept a construction of the order which limits its scope to failure to present demands since it is clear that there was ~~here~~ no attempt of any kind by petitioners to shield or obscure the terms of the agreement which they were seeking to attain. But the decision of the Wisconsin Supreme Court as already pointed out was not based upon this failure to announce objectives nor could it have been in face of the record. The Wisconsin Court's decision is based upon the alleged unlawful purpose of "interference with production."

And even if petitioners were to concede that which the record clearly contradicts—that the order bans the con-

certed activities engaged in only because of failure of petitioners to state their objectives, and that no objective was in fact stated, the petitioners assert for all the reasons already set forth in this brief that the rights guaranteed by federal statute and Constitution are not subject to any such arbitrary limitation.¹⁰

2. *Answer to respondents' suggestion that the activities were for the unlawful objective of attaining a maintenance of membership clause contrary to State law.*

It is also suggested by the respondents that if, in fact, the objectives were stated, such objectives necessarily include an illegal objective because based upon the Directive of the National War Labor Board which included a maintenance of membership clause which was illegal under the laws of the State of Wisconsin unless approved by two-thirds vote. [Section 111.06 (2) (b), construed together with Section 111.06 (1) (c).]

The respondents argued the same point to the Wisconsin Supreme Court. That it was rejected by the Wisconsin Supreme Court is apparent from its decision since nowhere in that decision is there any direct or indirect indication that the Wisconsin Court sustained the order of the Board and directed judgment enforcing such order because of any alleged illegal demand. This was properly so, since it is undisputed in the record that the union did not insist on a maintenance of membership clause but was willing to trade it off (R. 43, 47, 48-49); that prior to the hearing before the Board the requisite referendum had been conducted by the Board and the requisite number of votes obtained by the union (R. 40-41); that the demand was predicated on a Directive of the War Labor Board

¹⁰ See cases cited at page 43, *supra*, holding that it is not necessary to make a demand or to make demands known in order to avail one's self of the right to engage in the concerted activities protected by the Act.

which type of Directive had been previously sustained by the Wisconsin Court, in recognition of the superior federal power, in the case of **International Brotherhood of Paper Makers v. Wisconsin Employment Relations Board**, 245 Wis. 541, 15 N. W. (2) 806; and that nowhere in the findings of fact, conclusions of law, order or memorandum opinion did the Wisconsin Employment Relations Board, whose findings and conclusions were adopted by the Wisconsin Supreme Court, refer to or rely upon this aspect of the case nor did the Company seek review of the Board's failure so to do. The state Board must have been aware of the fact that it had already conducted the necessary referendum, with a result favorable to the Union.

Finally, the state contradicts its own position when in its Brief in Opposition to the Petition for Writ of Certiorari, at page 28, it flatly states:

"The remedy applied is based solely on Section 111.06 (2) (h)."

How then could it have been based upon a purported attempt to compel the employer to unlawfully sign a union shop agreement prohibited by Sections 111.06 (1) (c) and 111.06 (2) (b) of the Wisconsin Statutes?

Neither the decision of the Court nor the record will support the position that the order herein is based upon petitioners' attempt to compel the employer to yield to an allegedly illegal demand.

3. *Answer to respondents' position that the activities were an attempt to take over unilateral control of working hours without release of control over the means of production.*

It is urged by the respondents that the nature of the activities is such that it represents an attempt on the part

of the union or the employees to unilaterally control their working hours without at the same time releasing their control over the means of production.

This contention represents another attempt on the part of the respondents to recast the order of the Board and to reframe the decision of the Wisconsin Supreme Court. We have previously pointed out that the Wisconsin Court has construed the statute to make the instant activities unlawful **not** because of their nature, frequency or irregularity, but because of the purpose to which they were directed—"interference with production." And since the state Court excised the language "to take unauthorized possession of the property of the employer" from the statute in considering the applicability and materiality, its decision could not conceivably be based upon refusal to release control of production.

Nor does the State claim that these activities actually did result in the taking of unilateral control or did actually fail to release control of the means of production. Inasmuch as control of working hours and control of means of production has been and is within the Company's authority, it is rather far-fetched to say that the order was based upon that feature.¹¹ In making this argument the respondents find themselves in an untenable position when it is claimed that the activities engaged in are not protected activities under the National Labor Relations Act. If it is true that these are not protected activities under the federal law, then the employer can continue to assert his control over the property and over the hours of work since he will then have the unlimited right to discharge any or all who participate in the unprotected

¹¹ The State refers to one instance of a "sit-down." This was entirely unrelated to the current dispute and was without union authority, having been of spontaneous origin (R. 79-80, 82). The incident is nowhere referred to by the State Board or Court. The State Court expressly eliminated the incident from its consideration by disregarding the "unauthorized possession" portion of the statute in upholding the order.

activities. **National Labor Relations Board v. Fansteel Metallurgical Corp.**, supra; **N. L. R. B. v. Columbian Enameling & Stamping Co.**, 306 U. S. 292 (1939); **N. L. R. B. v. Sands Mfg. Co.**, 306 U. S. 332 (1939); **Southern Steamship Co. v. N. L. R. B.**, 316 U. S. 31 (1942). (It is to be noted that these cases involved forfeiture of reinstatement rights under the Act, and not injunctions.)

On the other hand if these are protected activities it would make no difference what the result is insofar as the employer is concerned since his resulting damage would be in the nature of *damnum absque injuria*, and he would have to accommodate himself to such activities within the framework of the law (See pp. 37-45, supra).

It would be an anomaly to hold that while an employer could not discharge employees for engaging in protected activities, the State might accomplish the same result for the employer by restraining the exercise of the protected rights.¹²

If the exercise of the federally-guaranteed rights results in embarrassment or operational difficulty to the employer it always remains within his province when confronted with economic strikes to replace economic strikers. **N. L. R. B. v. Mackay Radio and Telegraph Co.**, supra. If the hiring of replacements under the circumstances becomes difficult that does not make the activities unlawful. The

¹² In the following cases it was held to be a violation of the National Labor Relations Act to discharge employees for having engaged in activities similar to those instantly involved: **American Manufacturing Concern**, 7 N. L. R. B. 753 (walkouts during posted working hours in protest over length of work week); **Harnischfeger Corporation**, 9 N. L. R. B. 676 (refusal to work overtime and early arrival of night shift); **The Good Coal Co.**, 12 N. L. R. B. 136, enforced 110 F. (2) 501, cert. denied 310 U. S. 630 (refusal to work on scheduled work day); **Cudahy Packing Co.**, 29 N. L. R. B. 830 (part-time interruptions of work); **Niles Fire Brick Co.**, 30 N. L. R. B. 426, enforced 128 F. (2) 258 (refusal to take job where would result in discharge of union leader); **Spencer Auto Electric, Inc.**, 73 N. L. R. B. 1416 (walkout because of alleged discriminatory discharge); **Barton Brass Works**, 78 N. L. R. B. No. 56 (attendance at union meetings); **Massey Gin and Machine Works, Inc.**, 78 N. L. R. B. No. ... (walkout without notice and not called a strike).

state court reasoned backwards, and said that hardship on the employer makes otherwise lawful activities unlawful. The question is whether the activities are lawful because of either the means used or the end sought, and not because of resulting injury which is *damnum absque injuria*. **Senn v. Tile Layers Union**, 301 U. S. 468.

It might also be possible for the employer to take the position that since the activities make it unable to schedule its production properly, it may close the plant down thereby compelling a full-time strike until such time as negotiations are completed,—thus creating a situation the absence of which, respondents claim, justifies the restraint. **In re Duluth Bottling Association** (1943), 48 N. L. R. B. 1335.

In urging that these activities are not within the protection of the National Labor Relations Act because by such activities petitioners were seeking to unilaterally control their working hours, the state relies upon the case of **C. G. Conn, Ltd., v. N. L. R. B.**, 108 F. (2d) 390 (C. C. A. 7th, 1939).

This case was also cited to the Wisconsin Supreme Court, but was not mentioned nor relied upon by the court in its opinion. This omission confirms petitioners' position that the sole basis of the Wisconsin Court's judgment is the asserted "unlawful purpose" of "interference with production" rather than the means used.

The **Conn** Case, *supra*, involved a refusal to work scheduled hours because of dissatisfaction with those hours. The federal court said that under those circumstances the employees were seeking to determine for themselves what their hours of employment shall be and that the employer could discharge for such refusals.

— But in the instant case petitioners were not seeking to establish their own hours of employment. They were not

insisting that they be employed only seven, six or five hours a day. They were not insisting that they be employed on Mondays, Wednesdays, and Fridays, and not on Tuesdays and Thursdays. They were not insisting that they have a day off every five or ten days. (Petitioners' refusal to work Saturday overtime on a few occasions was not referred to at all by the Board in its findings and conclusions, nor by the state court, and did not form a basis for its order.) Petitioners were not insisting on the right to work on terms prescribed solely by them, but were insisting on **the right not to work** in order to arrive at an agreement relating to the terms of their employment. (In some cases the second shift did not report at all.)

The dispute arose over general terms and conditions of employment, and the refusal of the employer to accept a Directive Order of the National War Labor Board. In order to compel agreement, the employees engaged in strikes, not every day, nor every two days, but at such times and at such intervals as the Executive Board in its discretion saw fit, in accordance with the instructions of the employees. The strikes were called in the middle of a regularly scheduled work shift, not because the employees were dissatisfied with the duration of such shift, nor because they did not care to work all of the shift, but because they wanted to put pressure upon the Company with respect to the matters in dispute. This they had a right to do, and the decision of the federal Court in the **Conn** Case does not hold to the contrary in any way or manner. (See dissenting opinion of Treanor, J., at p. 401, holding that refusals to work overtime were protected activities under the Act, but the employer could replace such employees as economic strikers.)

It is submitted that respondents' attempt to recast the decision and judgment is neither supported by the record nor the decision of either the Wisconsin Board or the Wis-

consin Court, and further submitted that even if this Court were to accept respondents' interpretations, they afford no basis for sustaining the validity of the order and judgment in view of the superior federal power.

II.

The Wisconsin Board and Courts Had No Jurisdiction Over the Subject Matter. The Order and Judgment Are, Therefore, Void Under Article I, Section 8, and Article VI of the Constitution of the United States.

The Wisconsin Supreme Court rejected petitioners' argument that Sections 111.06 (2) (e) and 111.06 (2) (h) as applied and construed in this case deprive petitioners of federally-guaranteed rights. The court, however, considered not only the question of the state's power to act in a certain way, but also considered the question of the state's jurisdiction to act in the first instance. This last question relating to the right of the Wisconsin Board to take jurisdiction and act had not been originally raised by petitioners. This for the reason that it appeared to petitioners from this Court's decision in the case of **Allen-Bradley Local 1111 v. Wisconsin Employment Relations Board**, supra, that, absent any legislation by the federal Congress relating to unfair labor practices of unions or employees, the State was not precluded from reasonable regulation of those activities except insofar as the regulation had to be consistent with the federal policy.

Although this question of jurisdiction to act was not originally raised, the Wisconsin Court because of the decision of this Court in the case of **Bethlehem Steel Company v. New York State Federation of Labor**, 330 U. S. 767, passed upon the question, and concluded that the **Bethlehem** case, supra, was not applicable, and that Wisconsin maintained its jurisdiction over the subject mat-

ter (Decision at R. 117-119). - After the decision of the state Court on June 10, 1947, the Congress of the United States, on June 23, 1947, adopted the Labor Management Relations Act of 1947 over the President's veto. Because of the Wisconsin Court's interpretation of the **Bethlehem** case, supra, and the passage of the Labor Management Relations Act, petitioners in their Brief on Motion for Rehearing, at pages 31 through 34, pressed the question relating to the jurisdiction of the state to act at all, and requested the Court to reconsider its opinion on this point. The Wisconsin Court refused to grant the Motion for Rehearing.

Because of these circumstances, the question is properly before this Court, it having been urged and rejected in the Court below, and the rule being that appellate courts must consider the law at the time of review rather than at the time of entry of judgment. **Carpenter v. Wabash Railway**, 309 U. S. 23, 27; **American Steel Foundries v. Tri-City Central Trades Council**, 257 U. S. 184, 201; **N. L. R. B. v. Budd Manufacturing Company**, 92 Law. Ed. (adv. op.) 210.

The starting point in considering this question would seem to be the **Allen-Bradley** case, supra. In that case it was held that the National Labor Relations Act had not pre-empted the field because "Congress has not made such employee and union conduct as is involved in this case subject to regulation by the federal Board." Following the **Allen-Bradley** case, inconsistent state action was struck down on the basis of impairment of federal rights, rather than on the basis of congressional pre-emption of the field. **Hill v. Florida**, 325 U. S. 538.

Thereafter the question of pre-emption by the federal Government was squarely presented to this Court in the **Bethlehem** case, supra, which involved the right of the

New York State Labor Relations Board to conduct an election and to make a certification of bargaining representatives among employees of an employer over which the National Labor Relations Board clearly had jurisdiction although it had taken no positive action in the particular case.

In the **Bethlehem** case, *supra*, the question of preemption was extensively discussed because there was no certain declaration in the National Labor Relations Act that the Congress intended to preempt the field of collective bargaining elections among employees of employers engaged in interstate commerce. The problem, therefore, was whether or not the intention to exclude state power could be implied from the scheme and policy of the federal regulation. Pertinent here is the Court's declaration that (p. 773)

"when Congress has outlined its policy in rather general and inclusive terms and delegated determination of their specific application to an administrative tribunal, the mere fact of delegation of power to deal with the general matter, without agency action, might preclude any state action if it is clear that Congress has intended no regulation except its own."

It is with this rule in mind that we turn to consideration of the Labor Management Relations Act of 1947.

In enacting this law the Congress of the United States declared its policy:

"• • • to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with legitimate rights of the other, to protect the rights of individual employees in their relations with labor

organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce" [Sec. 1 (b)].

Congress also amended the findings and policies of the original National Labor Relations Act by adding the following language:

"Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed (Sec. 1, N. L. R. A.)."

But Congress also reaffirmed the policy of the United States to protect

"* * * the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

To carry out this new scheme of federal regulation, Section 8 (b) of the Labor Management Relations Act sets forth and defines with particularity and in wide scope what are certain "unfair labor practices" on the part of labor organizations or their agents, imposing certain limitations on their activities, and in providing for means of restraining the prohibited activities.

Section 10 (a) of the Act then provides as follows:

“Sec. 10 (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: **Provided**, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.”

Under the National Labor Relations Act, then, as amended by the Labor Management Relations Act of 1947, Congress has now engaged in a comprehensive system of regulation of the activities of employees acting through their unions, such regulation invoking both the processes of the National Labor Relations Board and the processes of the federal courts for effective enforcement. By the preamble, declaration of policy, and Section 10 (a) Congress has now made clear its intention to pre-empt the field of unfair labor practices on the part of employees and labor unions with the possible exception of the ordinary police power of the State to act in cases involving manifestations of force which would be unlawful whether engaged in by labor unions, employees or others, such as violence, breaches of the peace, rowdyism, etc. Therefore, the situation which was contemplated by the **Allen-Bradley**

case, *supra*, has now come into being, and the circumstances set forth in the **Bethlehem** case, *supra*, as evidencing the desires of Congress to exclude state action are clear and certain. **Gerry v. Superior Court**, 194 P. (2) 689 (Calif., 1948).

And even if there were not the express exclusion contained in Section 10 (a) of the amended Act, exclusion of state action in this case is nevertheless demonstrated under the tests set forth in the **Bethlehem** case, since here (p. 775)

“ * * * both governments have laid hold of the same relationship for regulation, and it involves the same employers and the same employees. Each has delegated to an administrative authority a wide discretion in applying this kind of regulation to specific cases, and they are governed by somewhat different standards. Thus, if both laws are upheld two administrative bodies are asserting a discretionary control over the same subject matter * * *. They might come out with the same determination, or they might come out with conflicting ones as they have in the past. * * *. But the power to decide a matter can hardly be made dependent upon the way it is decided. * * *. We do not think that a case by case test of federal supremacy is permissible here.”

Wisconsin and the federal government are now each seeking to regulate the unfair labor practices of employees, labor unions, and their agents in matters affecting and involving interstate commerce. Each has created an administrative agency with a wide discretion in applying the plan of regulation.

For example, under the federal Act, whether a complaint is to be issued or not is a matter for exclusive determina-

tion by the General Counsel of the National Labor Relations Board, Sec. 3 (d). Other wide administrative authority, discretionary in nature, has been delegated by the Board to the General Counsel. N. L. R. B. Rules and Regulations, Series 5, Section 204.3, Code of Federal Regulations, Title 29, Ch. II, Part 204 (13 F. R. 654).

Under the Wisconsin Act the invoking of the jurisdiction of the Wisconsin Board by the filing of a complaint requires the Board to handle the matter [Section 111.07 (2)].

Under the federal Act certain limits are placed upon the type of relief which may be granted [Section 10 (c)]. Wider discretion, however, is vested in the Wisconsin Employment Relations Board [Section 111.07 (4)].

There are many other wide differences in the provisions of each law, as will be disclosed by setting the following provisions of each Act side by side. (An appendix setting forth the Wisconsin Act is submitted herewith for the convenience of the Court.)

Labor Management Relations Act		Wisconsin Employment Relations Act
Section 2 (3)	defining employee	Section 111.02 (3)
Section (2) (9)	defining labor dispute	Section 111.02 (8)
Section 8 (a) (2)	employer domination or interference with labor organizations	Section 111.06 (1) (b)
Section 8 (a) (3)	permissible union security provisions	Section 111.06 (1) (c) and Section 111.02 (9)
Section 8 (a) (5) and) Section 8 (d))	relating to good faith collective bargaining	Section 111.06 (1) (d) and (e)
Section 8 (b) (1)	protection of employees' rights from union interference	Section 111.06 (2) (a)
Section 8 (b) (2)	union causing an employer to discriminate against employees	Section 111.06 (2) (b)
Section 8 (b) (4)	limitations on certain types of boycotts and strikes	Section 111.06 (2) (e), (f), (g), (h), (i), (j), (l) and Section 111.02 (12), (14)

Another wide difference will be found in the fact that there are no filing requirements in the state law similar to those required by 9 (f), (g) and (h) of the federal law.

These comparisons are not intended to be all-inclusive or as detailed or comprehensive as they might be, but by way of example sufficiently demonstrate that each statute regulates union or employees' unfair labor practices, as well as employers' unfair labor practices, along its own pattern without much regard for the other, and in a manner that the two cannot consistently stand together.

The variance between the two Acts in both substance and procedure is surely the best evidence of the difference in standards by which each is governed and the impossibility of the Wisconsin Act validly standing side by side with the national Act.¹³

To permit concurrent jurisdiction under such circumstances would destroy entirely the uniform plan of regulation emphasized by the Congress in giving to the National Labor Relations Board a limited authority to cede jurisdiction to state agencies in unfair labor practice cases in certain types of situation and then only where the state statute is consistent with the federal Act either in its language or construction [Sec. 10 (a)].

An apparent inconsistency is demonstrable by the instant case in which there is involved the question of the definition of the term "strike" as well as the legality of concerted activities and the legitimacy of certain objectives.

That untold mischief can result from the instant decision of the Wisconsin Court if it is permitted to stand, is

¹³ That there are differences in the powers and procedural requirements of the State and National Boards, as well as in the philosophy of the two acts, is pointed out by one of counsel for respondent State Board in 1946 Wisconsin Law Review, at 193, 195.

illustrated by the following example: Let us assume that the same activities engaged in by petitioners, in this case, should be carried on by other employees against their employer in a similar situation; that such employer, on the basis of the Wisconsin Court's holding that such activities are not protected activities under the National Labor Relations Act, discharges or refuses to reinstate the employees involved in such activities; that such employees then file their complaint with the National Labor Relations Board; that the National Board then determines, as we believe it must, that the activities are protected by the Act, and are not unfair labor practices under the Act. Under such circumstances the employer undoubtedly would be required by the National Board to reinstate such employees and make them whole for any wage loss which they may have suffered in the interim. Reliance, therefore, by an employer upon Wisconsin rulings results in imposing upon such employer sanctions under federal rulings. Similarly, labor unions and employees confronted with the determination of the Wisconsin Court as contrasted with the rights and privileges granted to them by federal legislation must either run the risk of expensive litigation and temporary restraints on the exercise of their rights, or abandon those rights guaranteed to them by the federal Act under compulsion and coercion of the state law.

To confront both employers and employees with state and federal administrative regulation of their activities, which regulations are in many instances inconsistent each with the other, and the administration of which regulations are vested on the one hand in a single administrative agency, and on the other hand in an administrative agency divided as to functions and duties between the office of the General Counsel and the administrative body itself, with the remedies to be applied and the orders to be entered differing from each other either under the law or

dependent upon administrative discretion; would give rise to a situation in industrial relations affecting interstate commerce entirely contrary to the expressed policy of the United States. The industrial peace and stability envisaged by the federal policy cannot become a reality where a premium is placed upon the ability to guess which of forty-nine sets of rules will govern—those of each of the forty-eight States or those of the Federal Government.

It is, therefore, respectfully submitted that not only did Wisconsin lack the power to act in the particular way in which it did, but that it had no jurisdiction to act at all in the first instance, and that, under Article I, Section 8, and Article VI of the Constitution, the judgment is void for lack of jurisdiction.

III.

A State Cannot Compel Employees Engaged in a Labor Dispute With Their Employer to Cease and Desist From Concerted Work Stoppages or From Inducing Such Stoppages. Such Restraint of Basic Civil Rights Is Contrary to the Thirteenth and Fourteenth Amendments to the Constitution of the United States.

In considering whether the judgment herein is violative of any constitutional rights under the Thirteenth and Fourteenth Amendments, a review of the full import of the restraint is of necessity the starting point. The state Board's order and the state Court's discussion of the order disclose the following:

1. The order is directed to the union and to the members of its bargaining committee. The union under Wisconsin law has no existence independent of its membership,—the membership is the union, and vice versa. (**Hromek v. Frei Gemeinde**, 238 Wis. 204, 209, 298 N. W. 587.) The Wis-

consin court pointed out that "whatever is forbidden to the union is forbidden to its members" (Decision at R. 113). The order, therefore, is directed to virtually all of the employees of the respondent corporation.

2. The order covers "doing any one of the things that by the Act constitutes an unfair labor practice" if it is "a concerted effort to interfere with production," excepting only a strike (Decision at R. 109). This comprehends all types of concerted activities short of a strike as defined by state law. (For criticism of apparent comprehensiveness of the order see dissenting opinion at R. 125.)

3. The order by its very language directs petitioners to cease and desist from any concerted efforts to interfere with production (a) by arbitrarily calling union meetings and inducing work stoppages during regularly scheduled working hours, or (b) engaging in any other concerted effort to interfere with production except by leaving the premises for the purpose of going on strike.

Bearing in mind that the excepted activity—a state-defined strike—carries with it the necessity of "continuous unemployment" until demands are met or compromised (Decision at R. 113), the net result of the order is to place petitioners in jeopardy of contempt proceedings for engaging in concerted withdrawals and for "arbitrarily" calling union meetings which result in, or are intended to result in interference with production, although for mutual aid and protection during the course of the labor dispute. The order also forbids refusals to report for work since that was one of the concerted activities engaged in by employees on the second shift who, after the first shift ceased work, did not report for work but attended the union meetings (R. 49).

It is not clear from the order or decision at what particular point a violation of the judgment will occur.

It appears that violation will occur should the individually named petitioners, or any other employees, "arbitrarily" call a union meeting or should they "induce" or participate in a work stoppage with intent to resume employment, without surrender of the disputed issue, failing settlement. Here it is the intent to return under such circumstances that places petitioners in jeopardy of contempt.

We believe it is a concept foreign to the principles of American law that such a quitting of employment with intent to return to work will subject employees to contempt proceedings. Yet it is on such slender thread that the employees' freedom depends in the instant case.

A. The order, judgment, and any statute upon which they may be based violate the Thirteenth Amendment to the Constitution of the United States.

The Thirteenth Amendment to the Constitution of the United States applies not only to commercial slavery, but embraces compulsory service "of whatever name and form and all its badges and incidents." **Bailey v. Alabama**, 219 U. S. 219, 241. The amendment also comprehends the "maintenance of a system of completely free and voluntary labor throughout the United States." **Pollock v. Williams**, 322 U. S. 4, 17.

It was pointed out in the **Pollock** case, *supra* (at p. 18), that where the laborer is obligated to continue his employment

"there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work. Resulting depression of working conditions and living standards affects not only the laborer under the system, but every other with whom his labor comes in competition. Whatever of social

value there may be, and of course it is great, in enforcing contracts and collection of debts, Congress has put it beyond debate that no indebtedness warrants a suspension of the right to be free from compulsory service. This congressional policy means that no state can make the quitting of work any component of a crime, or make criminal sanctions available for holding unwilling persons to labor. The federal statutory test is a practical inquiry into the utilization of an act as well as its mere form and terms."

If, as stated above, the act of quitting cannot be made a component of a crime then surely such act of quitting cannot be restrained in civil proceedings. See **U. S. v. Hutcheson**, supra, for the converse of this proposition.

The above expressions of the Court are consistent with the dissenting opinion of Justices Brandeis and Holmes in the case of **Bedford Cut Stone Company v. Journeymen Stone Cutters Association of North America**, 274 U. S. 37, 65:

"If, on the undisputed facts of this case, refusal to work can be enjoined, Congress created by the Sherman Law and the Clayton Act an instrument for imposing restraints upon labor which reminds of involuntary servitude."

The Wisconsin Court relied on **Aikens v. Wisconsin**, supra, p. 41, and **Dorchy v. Kansas**, 272 U. S. 306, as its authority.

The **Aikens** case, as already pointed out, dealt with activity malévolently done for the sake of harm and without just cause. And the **Dorchy** case did not involve the right to strike, but involved only the application of a criminal statute to an officer of a labor union who had induced a strike for the illegal purpose of collecting a stale wage claim at a time when there was no other labor dispute between the union and the company. The issue

in that case did not involve a previous restraint, but the right of the state to punish for a crime.

There is a multitude of lower court decisions identifying the right to engage in concerted stoppages, and to concertedly withhold services, as protected rights within the Thirteenth as well as the Fourteenth Amendment to the Constitution of the United States. Among such decisions are the following:

- Arthur v. Oakes**, 63 Fed. 310;
- Union Pacific Railroad Company v. Ruef**, 120 Fed. 102;
- Iron Moulders Union v. Allis-Chalmers Company**, 166 Fed. 45 (1908);
- Great Northern Railway Company v. Brosseau**, 286 Fed. 414;
- Stapleton v. Mitchell**, 60 Fed. Sup. 51;
- Alabama State Federation of Labor v. McAdory**, 18 So. (2d) 810 (Ala., 1944);
- Hotel & Restaurant Employees etc. v. Greenwood**, 30 So. (2d) 696 (Ala., 1947);
- In re: Porterfield**, 168 Pac. (2d) 706 (Calif., 1946);
- Ex Parte Blaney**, 184 Pac. 892 (Calif., 1947);
- Cohn and Roth Electric Co. v. Brick Layers et al.**, 101 Atl. 659 (Conn., 1917);
- American Federation of Labor v. Reilly**, 155 Pac. (2d) 145 (Colo., 1944);
- Henderson v. Coleman**, 7 So. (2d) 117 (Fla., 1942);
- Pickett v. Walsh**, 78 N. E. 753 (Mass., 1906);
- Lindsay v. Montana State Federation**, 96 Pac. 127 (1908);
- National Protective Association v. Cumming**, 63 N. E. 369 (N. Y., 1902).

In **Arthur v. Oakes**, *supra*, it was stated:

"One who is placed under such restraint is in a condition of involuntary servitude—a condition which

the supreme law of the land declares, shall not exist within the United States, or in any place subject to their jurisdiction."

The too pat answer to arguments identifying the right to strike or to engage in a concerted work stoppage with the liberty protected by the Thirteenth Amendment is that such amendment protects only the right of individuals and that combinations may be differently treated by the state. In the instant case the Wisconsin Court went back to a lower federal court decision of Judge Wilkerson who attained notoriety with his injunctions in the railroad strike cases of 1922 and who, in a case involving alleged boycotts and other activities in violation of the Sherman Anti-Trust Act, imposed a limited restraint on the right to strike based upon the theory of criminal conspiracy (Decision at R. 114).

In **National Protective Association v. Cumming**, supra, the New York Court of Appeals followed the classic dissent of Holmes, J., in **Vegehlán v. Guntner**, supra, saying:

"Whatever one man may do alone, he may do in combination with others provided they have no unlawful object in view. Mere numbers do not ordinarily affect the quality of the act."

And in **Lindsay and Company v. Montana State Federation of Labor**, supra, the Montana Supreme Court stated (p. 130):

"There can be found running through our legal literature many remarkable statements that an act perfectly lawful when done by one person becomes by some sort of legerdemain criminal when done by two or more persons acting in concert, and this upon the theory that the concerted action amounts to a conspiracy. But with this doctrine we do not agree. If

an individual is clothed with a right when acting alone he does not lose such right merely by acting with others, each of whom is clothed with the same right. If the act done is lawful, the combination of several persons to commit it does not render it unlawful. In other words, the mere combination of action is not an element which gives character to the act."

See also Mr. Justice Black's dissenting opinion in **Milk Drivers Union v. Meadowmoor**, supra, at page 305, wherein it was stated:

"But Illinois cannot, without nullifying constitutional guaranties, make it illegal to marshal public opinion against these general business practices. An agreement so to marshal public opinion is protected by the Constitution, even though called a 'common law' conspiracy or a 'common law' tort. Despite invidious names, it is still nothing more than an attempt to persuade people that they should look with favor upon one side of a public controversy."

In none of this court's picketing decisions was the element of concert considered in treating the constitutional question involved.

The conspiracy theory "grew out of an historical mistake, and has no real basis in our law. It is logically unsound and indefensible. Moreover, it is dangerous. . . . Sayre, "Criminal Conspiracy", 35 Harvard L. R. 398, 427 (1922).

It would seem that in view of judicial and Congressional recognition of the legality of combinations of working men, and in view of the social and economic justification for such combinations, the theory of "conspiracy" as applied to concerted activities during the course of a labor dispute—particularly where such activities are car-

ried on by the employees directly involved, and their dispute is not extended by way of boycott or otherwise—is untenable and unrealistic.

To assert that the constitutional right inheres to the individual but that two individuals in concert cannot exercise such right is to empty such right of any content or meaning in present day industrial life. **American Steel Foundries v. Tri-City Foundries**, 257 U. S. 184; **National Labor Relations Board v. Jones & Laughlin Steel Corporation**, 301 U. S. 1; **Clayton Act**, 38 Stat. 78, 29 U. S. Para. 52; **Norris-LaGuardia Act**, 47 Stat. 70, 29 U. S. C. Para. 101-115; **National Labor Relations Act**, *supra*.

To say that one person may protest the conditions under which he works by withholding his services, but that he may not, through his labor organization, agree with others to exercise that right in concert, is to nullify not only the expressed policy of the federal government, but to make a sham of the protection afforded by the Thirteenth Amendment.

While it is conceivable that under certain circumstances concerted stoppages or refusals to report for work may lead to civil liabilities, forfeiture of certain employee rights, or criminal prosecution, nevertheless, as the exercise of a constitutional right they are not subject to prior restraint on the part of the state, absent "clear and present danger". **Schenck v. United States**, 249 U. S. 47, 52 (1919); **Thomas v. Collins**, 323 U. S. 516; **Stapleton v. Mitchell**, *supra*.

Giving to the Thirteenth Amendment the "hospitable scope" of its reasonable intendment, particularly in view of the firmly accepted public policy expressed in the federal statutes and cases heretofore cited (see **U. S. v. Hutcheson**, *supra*), it cannot today be denied that employees, acting either singly, or in concert, or by agree-

ment or through their union, have the absolute right to quit their employment, particularly during the course of a labor dispute. Wisconsin, however, while recognizing that absolute right to quit (Decision, R. 114), maintains that it may restrain a concerted quit, **if the quit is for a stated interval of time and accompanied by an intent to return.**

So if today petitioners should announce to respondent company that on the morrow they will walk out for the purpose of asserting economic pressure to attain their demands, but will report for work the following day, even if not successful and without abandoning their demands, the violation of the judgment will occur at the moment that the employees leave or refuse to report simply because of their intent to return under the circumstances. The employees are, therefore, prohibited from leaving their employment if such leaving is for a previously fixed period of time and is conditioned upon an intent to return.

The employer, of course, always has it within his means to prevent fulfillment of the intent to return, since he is under no obligation to either settle the dispute nor to offer re-employment, providing there is no discrimination in violation of the National Labor Relations Act. Realistically speaking then the "intent" which gives rise to the violation of the judgment is no more than a "hope."

It is submitted that under the Thirteenth Amendment to the Constitution of the United States the right of employees to leave their employment cannot be restrained by the state because of their hope of returning at a fixed time if the employer will so permit.

B. The order and judgment and any statute upon which they may be based violate the Fourteenth Amendment to the Constitution of the United States.

The order and judgment direct the individual petitioners, as well as the union and its members, to cease and

desist from inducing work stoppages; and from arbitrarily calling union meetings for the purpose of interfering with production. This previous restraint upon such activities is in violation of the basic rights assured to petitioners under the Fourteenth Amendment to the Constitution of the United States, in that it abridges the exercise of the right of free speech, and public assemblage, and deprives them of a basic civil liberty: that of strengthening their employment rights and economic opportunities by combining with their fellow workmen.

In the cases of **Wolf Packing Company v. Court of Industrial Relations**, 262 U. S. 522, and 267 U. S. 552, this Court struck down a statute of the State of Kansas which prohibited employers from suspending operations, and employees from leaving their employment, while their wage dispute was being adjudicated by a state tribunal. It was held that both provisions were in violation of the Fourteenth Amendment, in that they curtailed the right of the employer and of the employee to contract about their affairs, which right was a part of the liberty of the individual guaranteed by the due process clause of the Fourteenth Amendment.

In the **Greenwood** case, *supra*, the Alabama Court very aptly pointed out that since the right of working men to picket in the course of a labor dispute is protected by the Constitution of the United States even where there is no strike, then surely the strike itself in the course of such dispute must be so identified.

Similarly, in **American Federation of Labor v. Reilly**, *supra*, the Colorado Court held:

“Notwithstanding the contrary contention of counsel for defendants, we think the decisions indicate that the constitutional guarantee of assembly to the people is not restricted to the literal right of meeting

together 'to petition the Government for a redress of grievances.' See **Hague v. C. I. O.**, supra; **DeJonge v. Oregon**, 299 U. S. 353; **Herndon v. Lowry**, 301 U. S. 242; **Murdock v. Penn.**, 319 U. S. 105; **State v. Butterworth**, 104 N. J. L. 579, 142 A. 57.

"While these decisions may not as unequivocally place the right of workmen to organize and operate as a voluntary labor association within the area of the guarantees of assembly and free speech as the **Thornhill** case locates peaceful picketing within the perimeter of the latter, their purport seems to us to support the conclusion of the trial court that sections 20 and 21 transgressed constitutionally by denying to unincorporated labor unions, and their individual members, any right to assemble and function as such in the promotion of their common welfare by lawful means."

That provision of the order which prohibits the inducing of a work stoppage directly limits the exercise of the right of free speech, and that part of the order which prohibits the "arbitrary" calling of union meetings is a direct restraint on the right of assemblage. Additionally, labor union activities in their totality, when engaged in by lawful means and for the lawful objective of attaining collective bargaining demands, have been held to come within the protection of the Fourteenth Amendment. The Fourteenth Amendment protects the right to assemble, discuss and persuade in matters relating to work stoppages or refusals to report for work, or relating to collective bargaining and labor disputes just as it applies to religious, political or other activities. **Senn v. Tile Layers Union**, 301 U. S. 468; **Hague v. C. I. O.**, 307 U. S. 496; **Snyder v. Milwaukee**, 308 U. S. 147; **Thornhill v. Alabama**, 310 U. S. 88; **Thomas v. Collins**, 323 U. S. 516.

In the **Thomas** case, supra, it was pointed out that the requirement of registration before making a public speech

on labor union matters, or as a condition precedent to solicitation of membership was "incompatible with the exercise of the rights of free speech and free assembly."

It was further pointed out that

"lawful public assemblies, involving no element of grave and immediate danger to an interest the state is entitled to protect, are not instruments of harm which require previous identification of the speakers."

The court went on to say:

"The restraint is not small when it is considered what was restrained. The right is a national right, federally guaranteed. There is some modicum of freedom of thought, speech and assembly which all citizens of the Republic may exercise throughout its length and breadth, which no State, nor all together, nor the Nation itself, can prohibit, restrain or impede."

And Justice Jackson, in a concurring opinion in this same case, said:

"This liberty (peaceable assemblage) was not protected because the forefathers expected its use would always be agreeable to those in authority or that its exercise always would be wise, temperate, or useful to society. As I read their intentions, this liberty was protected because they knew of no other way by which free men could conduct representative democracy."

See also **DeJonge v. State of Oregon**, 299 U. S. 353, and **Hague v. Committee of Industrial Organization**, *supra*.

The **Thomas** case identified the right of solicitation with the right of free speech and other rights assured by the Fourteenth Amendment. It was held that the speech and solicitation in that case, being part of a campaign for

union members, was an activity expressly guaranteed by the National Labor Relations Act, which Act included within its scope "whatever may be appropriate and lawful to accomplish and maintain such organization."

So here, the maintenance of the union of the employees of the respondent corporation, in the judgment of those employees, required the stoppages herein involved.¹⁴ Those employees as members of the union expressly authorized their officers to call such stoppages. The restraint, therefore, is not directed to "strangers" who for malicious reasons seek to induce a work stoppage, but to all employees who, having valid reasons, wish to assert their economic pressure. The expression of that desire or the "self-inducement" is a protected right under the Fourteenth Amendment. To say, as Wisconsin has said, that the employees through their chosen representatives may not induce a work stoppage is in effect to say that they may not discuss their grievances because such discussion may lead to the conclusion that the only method of redress is to cease employment.

The mere fact that the union meetings conflict with the running of a plant of a private employer is no basis for any injunctive order, except in reasonable apprehension of danger to an organized government. **Herndon v. Lowry**, 301 U. S. 242, 258. The only danger shown here is that of economic injury to the employer. This is not a substantive evil of such magnitude as to justify a limit to the constitutional rights which petitioners exercise. **Bakery and Pastry Drivers, etc. v. Wohl**, 315 U. S. 769, 775.

Since the right of lawful assembly and of free speech is the highest kind of right, such rights may only be curbed

¹⁴ Anthony Doria, union representative, testified that "the plan was to be able to have such control that when anything threatened our security in the plant we would be in a position to bring the members together to counteract acts against our union" (R. 48).

when they are abused. This court has held in the case of **Near v. Minnesota**, 283 U. S. 697, that the appropriate remedy for such abuse is punishment, but that an injunction seeking to prevent the exercise of the right is violative of the Fourteenth Amendment.

Here the State imposed a previous restraint on rights assured by the Fourteenth Amendment, without any showing of clear and present danger. It is submitted that the judgment cannot stand.

Conclusion on the Thirteenth and Fourteenth Amendments.

The Thirteenth and Fourteenth Amendments have been treated separately as applicable to the restraint in the instant case. What is really involved here, however, is a composite of basic civil rights and liberties which fall within the protection of both Amendments considered together. (See **47 Columbia Law Review 299**; **42 Columbia Law Review 702, 704**.) That composite of rights embraces the privilege of employees to cease their employment, or to refuse to report for employment by concert of agreement or action; to express their opinion on the necessity of doing so, and to urge, induce, or persuade their fellow employees to do so; to call and attend union meetings off the premises of the employer, even though such meetings take place during working hours; and to do all other things necessary to make their organization effective, and to prevail in collective bargaining during the course of a labor dispute. Particularly is this so since there is no suggestion here that the exercise of such rights and liberties presents a clear and present danger to the community. And while such activities are necessarily intended in part to interfere with production, and such interference will normally result, just so long as the activities are not attended by violence, breach of the peace, or other concomitants which

would under some circumstances permit a restraint to preserve superior or cognate rights, there is no basis for the restraint herein imposed.

It is submitted that the right of employees to cease work collectively, and the incidents thereof, such as inducing such action and attending union meetings, as was the case here, may be considered either as an exercise of the right to earn a livelihood, the right by agreement to dispose of labor, the right of assembly, the right of free speech, the right to be free from involuntary servitude, or a composite of all such constitutional rights, privileges and immunities under the Thirteenth and Fourteenth Amendments to the Constitution of the United States. Therefore, the judgment herein, and any statute upon which it is purportedly based, are void.

IV.

Section 111.06 (2) (e) of the Wisconsin Statutes and the Order and Judgment, Insofar as They Are Purportedly Based Upon Such Provision, Are Unconstitutional and Void, Because Contrary to and in Violation of the Fourteenth Amendment to the Constitution of the United States.

At page ²⁹49 hereof the provisions of Section 111.06 (2) (e) of the Wisconsin Statutes are set forth, and it is pointed out that although in the state's Brief opposing Certiorari, the state now claims that this section is not involved in the case, nevertheless, the Wisconsin Court did sustain the order, in part at least, on this section.

We have previously argued in this brief that this section of the statutes is of no avail to the state as justification for depriving petitioners of rights secured to them under the National Labor Relations Act, and that the re-

straint, regardless of what section of the statutes it is based on, is in violation of the Thirteenth and Fourteenth Amendments. The present argument is directed to the point that Section 111.06 (2) (c) on its face, and as applied in this case, is unconstitutional under the Fourteenth Amendment because of the majority-minority rule therein embodied.

This point was previously urged to this court in the case of **Hotel and Restaurant Employees International Union v. Wisconsin Employment Relations Board**, 315 U. S. 437. It was not there considered by the court in arriving at its decision because it appeared to this court that the judgment in that case was not based upon such section, but rather upon acts of violence and breaches of the peace. Since the Wisconsin Court in the instant case clearly relied upon such statute on its face, above and beyond any consideration of unlawful acts similar to those in the **Hotel and Restaurant Employees Case**, supra, the question is now squarely before this court as to whether or not the majority-minority device as a test of legality of concerted activities represents valid classification and discrimination under the equal protection clause of the Fourteenth Amendment to the Constitution.

States may make proper classifications when enacting laws in order to subserve public objects, but such classification, as has been pointed out by this court,

"must always rest upon some difference which bears a reasonable and just relation to the Act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis." **Connolly v. Union Sewer Pipe Company**, 184 U. S. 540.

In the instant case the classification is indefinite and lacks any semblance of rationality. It is not based upon geographical location, public health, safety, or morals.

density of population, nor nature of the occupation. It has no relationship to the type of business, to the location of the plant or establishment, nor to whether the activities occur in an industrial or residential section, in the heavy-traffic area, or light-traffic area, or in an adequately policed area, or not.

It is not even based on numbers, but solely on what is or is not a majority in a particular case. The law provides that in one situation two may engage in concerted peaceful activities if they comprise a majority; while in another situation 5,000 may not engage in the same peaceful activities if they do not comprise a majority or, if a majority did not approve by secret ballot. A majority in a small plant may be a minority in a plant employing thousands. A majority in a slack season very quickly becomes a minority in the busy season. Arithmetically, the majority may be as little as two in a small establishment, and may rise into the hundreds of thousands in the large industrial enterprises in this country. The same is true of minorities.

It is difficult to see what there is inherent in the mere taking of a secret vote or the failure to take such vote, or in the acquiescence by a majority to strike, which in one instance presupposes that the activities will not present danger to the lives and property of citizens, and which in the other instance assumes that such danger will arise.

Wisconsin has in effect said that while the activities per se are not unlawful if licensed by a majority and secret ballot, they become unlawful in the absence of such majority license or ballot. Yet, in each situation there is an interference with production and it seems rather obvious that in the one situation where the interference results from majority action, the resulting economic harm would be much greater than in the prohibited situation where interference results from minority action.

Nor can the majority-minority rule be construed as a protection of an unwilling majority, since all employees, as individuals, do have a right under statute and decision to engage in or refrain from such activities, regardless of the desires of their co-employees. (National Act, Section 7; Wisconsin Act, Section 111.04.)

In addition, the way and manner in which the majority-minority rule is to be applied is attended by obscurity. There is no statutory definition of the way and manner in which this vote shall be conducted, the place at which it shall be conducted, or by whom it shall be conducted. Apparently, if the employees have designated a collective bargaining representative, such representative may conduct the vote, but if a majority of all employees in the unit fail to attend and cast a favorable ballot, even though it is the unanimous decision of those present at the meeting, there has been no compliance with the law. Presumably if employees are not represented by a collective bargaining representative, the most aggressive in their group will have to assume the cost of financing the meeting and mechanics of polling all employees. And if all go out without a secret ballot vote, the law has been violated.

It is with such vague, ambiguous, and illogical requirements that the petitioners herein were compelled to comply, and failure to comply was found, although both by oral and secret ballot the preponderant majority of all employees within the bargaining unit approved of the activities and engaged in them.

That a majority-minority rule does not provide a valid basis for state action in matters growing out of a labor dispute was held in **American Federation of Labor v. Swing**, *supra*, involving the protected right to picket. Similarly in strike and other concerted activity cases, it has been held by a number of lower courts that the majority-minority rule affords no valid distinction for state

action. **Stapleton v. Mitchell**, 60 Fed. Supp. 51; **Alabama Federation of Labor v. McAdory**, 18 So. (2nd) 810, 827 (Ala., 1944); **American Federation of Labor v. Bain**, 106 P. (2) 544, 555 (Oregon, 1940).

In the **Stapleton** case, supra, a special three-Judge Federal Court had before it the question of the validity of a statute of the State of Kansas, which conditioned strikes, walkouts, or cessations of work upon majority-vote authorization. The court held that:

“The right to peaceably strike or to participate in one, to work or refuse to work, and to choose the terms and conditions under which one will work, like the right to make a speech, are fundamental human liberties which the state may not condition or abridge in the absence of grave and immediate danger to the community.”

In the **Alabama Federation of Labor** case, supra, a provision requiring majority authorization prior to strike was declared invalid upon the basis that individuals have the right to strike for legally justifiable purposes, and that such right rests in the minority, as well as in the majority. The court concluded as follows:

“Reduced to its last analysis, therefore, the question arises as to the reasonableness of a regulation making the right to strike dependent upon the will of others who may not in any manner be connected with, or interested in, the welfare of the minority group. Indeed these other employees may not belong to or believe in a labor organization.”

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“We are well convinced that a prohibition to strike placed upon a minority group unless sanctioned by secret ballot or others who are without interest in their

welfare, is an unreasonable and arbitrary restraint, and must be stricken down."

To similar effect is the decision of this court in the case of **Truax v. Raich**, 239 U. S. 33 (1915), in which state legislation limiting the proportion of aliens which might be hired in business establishments was declared invalid. The court first identified the right of individuals to follow their calling as "the very essence of the personal freedom and opportunity that it was the purpose of the Amendment (Fourteenth) to secure." It rejected the argument that "the employment of aliens, unless restrained, was a peril to the public welfare," and then dealt with the question of whether or not the statute embodied reasonable classification based upon the ratio fixed. The court said (p. 43):

"But the fallacy of this argument at once appears. If the state is at liberty to treat the employment of aliens as in itself a peril, requiring restraint regardless of kind or class of work, it cannot be denied that the authority exists to make its measures to that end effective. (Citing cases.) If the restriction to 20 per cent now imposed is maintainable, the state undoubtedly has the power, if it sees fit, to make the percentage less. We have nothing before us to justify the limitation to 20 per cent save the judgment expressed in the enactment, and if that is sufficient, it is difficult to see why the apprehension and conviction thus evidenced would not be sufficient were the restriction extended so as to permit only 10 per cent of the employees to be aliens, or even a less percentage; * * * The restriction now sought to be sustained is such as to suggest no limit to the state's power of excluding aliens from employment if the principle underlying the prohibition of the act is conceded. No special public interest with respect to any particular business is shown that could possibly be deemed to

support the enactment, for, as we have said, it relates to every sort."

So here, if the state may restrict the right to concerted activities to a majority of employees, regardless of the business involved or any other attendant circumstances, the classification can be sustained only if it is assumed that the state has the right to ban all concerted activities. If a majority-minority classification is reasonable, then so would a 75 per cent—25 per cent, or a 90 per cent—10 per cent, or a 100 per cent—0 per cent, or a total prohibition. Therefore, to sustain the majority-minority principle would be in effect to sustain the right of a state to prohibit all concerted activities for the purpose of mutual aid and protection, the limitation herein having no regard to either the nature of the activity nor the objective sought.

The requirement of a majority vote by secret ballot is no different than a requirement of prior license, the only distinction being that in one instance the license depends upon the whim of the state or city, acting through its licensing official, and in the other it depends upon the whim of a perhaps too docile majority. (In the instant case, of course, the court relied only upon the technicality of failing to vote by secret ballot, and failure to use the term "strike," since it is conceded that the activities were in fact sanctioned by virtually all in the plant.) For this reason there is no distinction between the majority-minority, secret-ballot rule approved by the Wisconsin Supreme Court in this case, and those cases of this court which have invalidated state action requiring licenses for public assemblage or for distribution of religious literature or union organization. **Lovell v. Griffin**, 303 U. S. 444 (1938); **Hague v. C. I. O.**, supra; **Schneider v. State of New Jersey**, 308 U. S. 147; **Cantwell v. Connecticut**, 310 U. S. 296; **Largent v. Texas**, 318 U. S. 418 (1943); **Murdock v. Pennsylvania**, 319 U. S. 105 (1943); **West Virginia v.**

Barnette, 319 U. S. 624 (1943); **Follett v. McCormick**, 321 U. S. 573 (1944); and **Thomas v. Collins**, *supra*.

In the **Follett** case, *supra*, the court said:

“ * * * We fail to see how such a tax loses its constitutional infirmity when exacted from those who confine themselves to their own village or town and spread their religious beliefs from door to door or on the street. The protection of the First Amendment is not restricted to orthodox religious practices any more than it is to the expression of orthodox economic views. He who makes a profession of evangelism is not in a less preferred position than the casual worker.”

Wisconsin has here sought to substitute principles of arithmetic for principles of morality. Legislation of this type may very well be the opening wedge to exploitation of minority groups in this country similar to that demonstrated by the recent tragic history of Europe where minority, racial, political and economic groups, were mercilessly punished and deprived of all human rights.

CONCLUSION.

These proceedings have come to the attention of this Court, primarily because of the interpretation of the term “strike” by the Wisconsin Supreme Court. As a result of misinterpretation, Wisconsin has declared to be unlawful and subject to restraint those concerted activities firmly protected by the federal law and Constitution, and has rendered utterly meaningless the protections so afforded.

The type of strike carried on here by petitioners is one that should be encouraged, as compared to the long, protracted, full-time strike. By its very nature, it causes far less economic hardship on all parties: the employee, the employer, and the public. For the employee it makes pos-

sible regular, although reduced, pay-checks; for the employer it has the virtue of relatively continuous production; for the public, it not only makes available the product manufactured, but also shields against widespread hardship caused to the community by the continuous unemployment of substantial numbers of men.

A short-time strike or stoppage provides to the working man the opportunity to secure for himself over a longer period what he may not be able to attain over a shorter continuous period financed out of his reserves rather than out of current income. In this way the working man is placed on a more equal bargaining basis by removing the need of individual financial resources to support his demands at the bargaining table.

And while there may be difference of opinion on this appraisal, depending upon one's economic or social philosophy, the fact remains that the activities, both by their nature and in their objective, fall within that area of permissible conduct recognized and guaranteed by the federal law and Constitution.

The restraint imposed by the State of Wisconsin, which prohibits the employees from engaging in concerted efforts to interfere with production by merely leaving the premises in an orderly fashion, or by refusing to enter upon the premises for the purpose of attaining legitimate bargaining demands or to induce such action, unless previously ratified by a majority secret ballot vote to go out on a state-defined strike, and unless the peaceful leaving or refusal to enter upon the premises is continued until the labor dispute is resolved one way or the other, is a flagrant violation of rights of petitioners.

Petitioners again emphasize that the employer here still has the right to take whatever action he deems appropriate, and which may be permissible under the law. His sue-

with him, nor from cooperating with representatives of at least a majority of his employees in a collective bargaining unit, at their request, by permitting employee organizational activities on company premises or the use of company facilities where such activities or use create no additional expense to the company.

(c) 1. To encourage or discourage membership in any labor organization, employee agency, committee, association or representation plan by discrimination in regard to hiring, tenure or other terms or conditions of employment; provided, that an employer shall not be prohibited from entering into an all union agreement with the representatives of his employees in a collective bargaining unit, where at least two-thirds of such employees voting (provided such two-thirds of the employees also constitute at least a majority of the employees in such collective bargaining unit) shall have voted affirmatively by secret ballot in favor of such all-union agreement in a referendum conducted by the board. Such authorization of an all-union agreement shall be deemed to continue thereafter, subject to the right of either party to the all-union agreement to request the board in writing to conduct a new referendum on the subject. Upon receipt of such request by either party to the agreement, the board shall determine whether there is reasonable ground to believe that there exists a change in the attitude of the employees concerned toward the all-union agreement since the prior referendum and upon so finding the board shall conduct a new referendum. If the continuance of the all-union agreement is supported on any such referendum by a vote at least equal to that hereinabove provided for its initial authorization, it may be continued in force and effect thereafter, subject to the right to request a further vote by the procedure hereinabove set forth. If the continuance of the all-union agreement is not thus supported on any such referendum, it

cess or failure in the use of his generally superior economic power is no more pertinent to a determination of the legitimacy of the activities than is the petitioners' success or failure.

If the State should be permitted in this case to throw its weight on the side of the employer, in the circumstances here involved and in the manner in which it has sought to do, then all talk of "labor's Magna Charta" will become mere idle prattle and the Federal Government will default to the whims and caprices of the State, its decisional, legislative, and constitutional declarations of policies and rights.

It is respectfully submitted that Article I, Section 8, and Article VI of the Constitution of the United States, from which the National Labor Relations Act draws its validity and supremacy, and that the Thirteenth and Fourteenth Amendments to the Constitution firmly shield against limitation or previous restraint by the several States the right of working men to cease their work collectively in furtherance of collective bargaining demands during the course of a labor dispute; although by such acts injury or inconvenience may result to a private employer. This is so whether such right is considered that of free speech, assembly, freedom from involuntary servitude, or the fundamental right to engage in concerted activities for mutual aid and protection. The State action here, therefore, and any State statute on which it is purported based are unconstitutional and void.

Respectfully submitted,

DAVID PREVIANT,

Counsel for Petitioners.

Of Counsel: —

A. G. GOLDBERG,
SAUL COOPER.

shall be deemed terminated at the termination of the contract of which it is then a part or at the end of one year from the date of the announcement by the board of the result of the referendum, which ever proves to be the earlier date. The board shall declare any such all-union agreement terminated whenever it finds that the labor organization involved has unreasonably refused to receive as a member any employe of such employer, and each such all-union agreement shall be made subject to this duty of the board. Any person interested may come before the board as provided in section 111.07 and ask the performance of this duty. Any all-union agreement in existence on May 5, 1939, and renewed or amended continuously since that time shall be deemed valid and enforceable in all respects.

(c) 2. No petition by an employer for a referendum to determine whether an all-union agreement is desired by his employes shall be entertained by the board where such employer has a contract or is negotiating for a contract with a labor organization which has been duly constituted as the bargaining representative of his employes unless such employer has made an agreement with such labor organization that he will make a contract for an all-union shop if it is determined as a result of the referendum held by the board that his employes duly approve such all-union shop.

(d) To refuse to bargain collectively with the representative of a majority of his employes in any collective bargaining unit; provided, however, that where an employer files with the board a petition requesting a determination as to majority representation, he shall not be deemed to have refused to bargain until an election has been held and the result thereof has been certified to him by the board.

(e) To bargain collectively with the representatives of less than a majority of his employes in a collective bargain-

ment or services; or to combine or conspire to hinder, or prevent, by any means whatsoever, the obtaining, use or disposition of materials, equipment or services, provided, however, that nothing herein shall prevent sympathetic strikes in support of those in similar occupations working for other employers in the same craft.

(h) To take unauthorized possession of property of the employer or to engage in any concerted effort to interfere with production except by leaving the premises in an orderly manner for the purpose of going on strike.

(i) To fail to give the notice of intention to strike provided in section 111.11.

(j) To commit any crime or misdemeanor in connection with any controversy as to employment relations.

(1) To engage in, promote or induce a jurisdictional strike.

(3) It shall be an unfair labor practice for any person to do or cause to be done on behalf of or in the interest of employers or employees, or in connection with or to influence the outcome of any controversy as to employment relations any act prohibited by subsections (1) and (2) of this section.

111.07 Prevention of unfair labor practices. (1) Any controversy concerning unfair labor practices may be submitted to the board in the manner and with the effect provided in this chapter, but nothing herein shall prevent the pursuit of legal or equitable relief in courts of competent jurisdiction.

(2) Upon the filing with the board by any party in interest of a complaint in writing, on a form provided by the board, charging any person with having engaged in any specific unfair labor practice, it shall mail a copy of

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1948.

Nos. 14 and 15.

INTERNATIONAL UNION, UNITED AUTOMOBILE WORKERS OF AMERICA, A. F. of L., LOCAL 232; ANTHONY DORIA, CLIFFORD MATCHEY, WALTER BERGER, ERWIN FLEISCHER, JOHN M. CORBETT, OLIVER DOSTALER, CLARENCE EHLMANN, HERBERT JACOBSEN, LOUIS LASS,

Petitioners,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, HENRY RULE and J. E. FITZGIBBON, as Members of the Wisconsin Employment Relations Board; and BRIGGS & STRATTON CORPORATION, a Corporation,

Respondents.

APPENDIX TO PETITIONERS' BRIEF:

Chapter 111; Wisconsin Statutes.

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such complaint to all other parties in interest. Any other person claiming interest in the dispute or controversy, as an employer, an employee, or their representative, shall be made a party upon application. The board may bring in additional parties by service of a copy of the complaint. Only one such complaint shall issue against a person with respect to a single controversy, but any such complaint may be amended in the discretion of the board at any time prior to the issuance of a final order based thereon. The person or persons so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the notice of hearing. The board shall fix a time for the hearing on such complaint, which will be not less than ten nor more than forty days after the filing of such complaint, and notice shall be given to each party interested by service on him personally or by mailing a copy thereof to him at his last known post office address at least ten days before such hearing. In case a party in interest is located without the state and has no known post office address within this state, a copy of the complaint and copies of all notices shall be filed in the office of the secretary of state and shall also be sent by registered mail to the last known post office address of such party. Such filing and mailing shall constitute sufficient service with the same force and effect as if served upon the party located within this state. Such hearing may be adjourned from time to time in the discretion of the board and hearings may be held at such places as the board shall designate.

The board shall have the power to issue subpoenas and administer oaths. Depositions may be taken in the manner prescribed by section 101.21. No person shall be excused from attending and testifying or from producing books, records, correspondence, documents, or other evidence in

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1948.

Nos. 14 and 15.

INTERNATIONAL UNION, UNITED AUTOMOBILE WORKERS OF AMERICA, A. F. of L. LOCAL 232; ANTHONY DORIA, CLIFFORD MATCHEY, WALTER BERGER, ERWIN FLEISCHER, JOHN M. CORBETT, OLIVER DOSTALER, CLARENCE EHLMANN, HERBERT JACOBSEN, LOUIS LASS,

Petitioners,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, HENRY RULE and J. E. FITZGIBBON, as Members of the Wisconsin Employment Relations Board; and BRIGGS & STRATTON CORPORATION, a Corporation,

Respondents.

APPENDIX TO PETITIONERS' BRIEF:

Chapter 111; Wisconsin Statutes.

WISCONSIN STATUTES.

CHAPTER 111.

Employment Relations.

(Enacted in 1939, amended in 1947.)

111.01 Declaration of policy. The public policy of the state as to employment relations and collective bargaining, in the furtherance of which this chapter is enacted, is declared to be as follows:

(1) It recognizes that there are three major interests involved, namely: That of the public, the employee, and the

employer. These three interests are to a considerable extent interrelated. It is the policy of the state to protect and promote each of these interests with due regard to the situation and to the rights of the others.

(2) Industrial peace, regular and adequate income for the employe, and uninterrupted production of goods and services are promotive of all of these interests. They are largely dependent upon the maintenance of fair, friendly and mutually satisfactory employment relations and the availability of suitable machinery for the peaceful adjustment of whatever controversies may arise. It is recognized that certain employers, including farmers and farmer cooperatives, in addition to their general employer problems, face special problems arising from perishable commodities and seasonal production which require adequate consideration.

It is also recognized that whatever may be the rights of disputants with respect to each other in any controversy regarding employment relations, they should not be permitted, in the conduct of their controversy, to intrude directly into the primary rights of third parties to earn a livelihood, transact business and engage in the ordinary affairs of life by any lawful means and free from molestation, interference, restraint or coercion.

(3) Negotiations of terms and conditions of work should result from voluntary agreement between employer and employe. For the purpose of such negotiation an employe has the right, if he desires, to associate with others in organizing and bargaining collectively through representatives of his own choosing, without intimidation or coercion from any source.

(4) It is the policy of the state, in order to preserve and promote the interests of the public, the employe, and the

employer alike, to establish standards of fair conduct in employment relations and to provide a convenient, expeditious and impartial tribunal by which these interests may have their respective rights and obligations adjudicated.

While limiting individual and group rights of aggression and defense, the state substitutes processes of justice for the more primitive methods of trial by combat.

111.02 Definitions. When used in this chapter:

(1) The term "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, or receivers.

(2) The term "employer" means a person who engages the services of an employe, and includes any person acting on behalf of an employer within the scope of his authority, express or implied, but shall not include the state or any political subdivision thereof, or any labor organization or anyone acting in behalf of such organization other than when it is acting as an employer in fact.

(3) The term "employe" shall include any person, other than an independent contractor, working for another for hire in the state of Wisconsin in a non-executive or non-supervisory capacity, and shall not be limited to the employes of a particular employer unless the context clearly indicates otherwise; and shall include any individual whose work has ceased solely as a consequence of or in connection with any current labor dispute or because of any unfair labor practice on the part of an employer and (a) who has not refused or failed to return to work upon the final disposition of a labor dispute or a charge of an unfair labor practice by a tribunal having competent jurisdiction of the same or whose jurisdiction was accepted by the employe or his representative, (b) who has not been found to

have committed or to have been a party to any unfair labor practice hereunder, (c) who has not obtained regular and substantially equivalent employment elsewhere, or (d) who has not been absent from his employment for a substantial period of time during which reasonable expectancy of settlement has ceased (except by an employer's unlawful refusal to bargain) and whose place has been filled by another engaged in the regular manner for an indefinite or protracted period and not merely for the duration of a strike or lockout; but shall not include any individual employed in the domestic service of a family or person at his home or any individual employed by his parent or spouse or any employee who is subject to the federal railway labor act.

(4) The term "representative" includes any person chosen by an employee to represent him.

(5) "Collective bargaining" is the negotiating by an employer and a majority of his employees in a collective bargaining unit (or their representatives) concerning representation or terms and conditions of employment of such employees in a mutually genuine effort to reach an agreement with reference to the subject under negotiation.

(6) The term "collective bargaining unit" shall mean all of the employees of one employer (employed within the state), except that where a majority of such employees engaged in a single craft, division, department or plant shall have voted by secret ballot as provided in section 111.05 (2) to constitute such group a separate bargaining unit they shall be so considered, provided, that in appropriate cases, and to aid in the more efficient administration of the employment peace act, the board may find where agreeable to all parties affected in any way thereby an industry, trade or business comprising more than one employer in an association in any geographical area to be a "collective

bargaining unit". A collective bargaining unit thus established by the board shall be subject to all rights by termination or modification given by this chapter 111 in reference to collective bargaining units otherwise established under said chapter. Two or more collective bargaining units may bargain collectively through the same representative where a majority of the employees in each separate unit shall have voted by secret ballot as provided in section 111.05 (2) so to do.

(7) The term "unfair labor practice" means any unfair labor practice as defined in section 111.06.

(8) The term "labor dispute" means any controversy between an employer and the majority of his employees in a collective bargaining unit concerning the right or process or details of collective bargaining or the designation of representatives. Any organization with which either the employer or such majority is affiliated may be considered a party to the labor dispute.

(9) The term "all-union agreement" shall mean an agreement between an employer and the representative of his employees in a collective bargaining unit whereby all or any of the employees in such unit are required to be members of a single labor organization.

(10) The term "board" means the Wisconsin employment relations board, as created by section 111.03,

(11) The term "election" shall mean a proceeding in which the employees in a collective bargaining unit cast a secret ballot for collective bargaining representatives or for any other purpose specified in this chapter and shall include elections conducted by the board, or, unless the context clearly indicates otherwise, by any tribunal having competent jurisdiction or whose jurisdiction was accepted by the parties.

(12) The term "secondary boycott" shall include combining or conspiring to cause or threaten to cause injury to one with whom no labor dispute exists, whether by (a) withholding patronage, labor, or other beneficial business intercourse, (b) picketing, (c) refusing to handle, install, use or work on particular materials, equipment or supplies, or (d) by any other unlawful means, in order to bring him against his will into a concerted plan to coerce or inflict damage upon another.

(14) The term "jurisdictional strike" shall mean a strike growing out of a dispute between two or more employees or representatives of employees as to the appropriate unit for collective bargaining, or as to which representative is entitled to act as collective bargaining representative, or as to whether employees represented by one or the other representative are entitled to perform particular work.

111.03 Employment relations board. There is hereby created a board to be known as Wisconsin employment relations board, which shall be composed of three members, who shall be appointed by the governor by and with the consent of the senate. No appointee at the time of the creation of the board shall serve on said board without first having been confirmed by the senate. The term of office of the members first to be appointed shall be two, four and six years respectively, but their successors shall be appointed for terms of six years each, except that any individual appointed to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The governor shall designate one member to serve as chairman of the board. Each member of the board shall take and file the official oath. A vacancy in the board shall not impair the right of the remaining members to exercise all the powers of the board and two members of the board shall constitute a quorum. The

board shall have a seal for the authentication of its orders and proceedings, upon which shall be inscribed the words "WISCONSIN EMPLOYMENT RELATIONS BOARD—Seal". Each member of the board shall be eligible for reappointment and shall not engage in any other business, vocation or employment. The board may employ, promote and remove a secretary, deputies, clerks, stenographers and other assistants, and examiners, fix their compensation and assign them to their duties, consistent with the provisions of this chapter. The board shall maintain its office at Madison and shall be provided by the director of purchases with suitable rooms, necessary furniture, stationery, books, periodicals, maps and other necessary supplies. The board may hold sessions at any place within the state when the convenience of the board and the parties so requires. At the close of each fiscal year the board shall make a written report to the governor of such facts as it may deem essential to describe its activities, including the cases it has heard, its disposition of the same, and the names, duties and salaries of its officers and employes. A single member of the board is hereinafter in this chapter referred to as a commissioner.

111.04 Rights of employees. Employes shall have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection; and such employes shall also have the right to refrain from any or all of such activities.

111.05 Representatives and elections. (1) Representatives chosen for the purposes of collective bargaining by a majority of the employes voting in a collective bargaining unit shall be the exclusive representatives of all of the employes in such unit for the purposes of collective bargain-

ing, provided that any individual employe or any minority group of employes in any collective bargaining unit shall have the right at any time to present grievances to their employer in person or through representatives of their own choosing, and the employer shall confer with them in relation thereto.

(2) Whenever a question arises concerning the determination of a collective bargaining unit as defined in section 111.02 (6), it shall be determined by secret ballot, and the board, upon request, shall cause the ballot to be taken in such manner as to show separately the wishes of the employees in any craft, division, department or plant as to the determination of the collective bargaining unit.

(3) Whenever a question arises concerning the representation of employes in a collective bargaining unit the board shall determine the representatives thereof by taking a secret ballot of employes and certifying in writing the results thereof to the interested parties and to their employer or employers. There shall be included on any ballot for the election of representatives the names of all persons submitted by an employe or group of employes participating in the election, except that the board may, in its discretion, exclude from the ballot one who, at the time of the election, stands deprived of his rights under this chapter by reason of a prior adjudication of his having engaged in an unfair labor practice. The ballot shall be so prepared as to permit of a vote against representation by anyone named on the ballot. The board's certification of the results of any election shall be conclusive as to the findings included therein unless reviewed in the same manner as provided by subsection (8) of section 111.07 for review of orders of the board.

(3m) Whenever an election has been conducted pursuant to subsection (3) in which the name of more than one pro-

posed representative appears on the ballot and results in no conclusion, the board may, in its discretion, if requested by any party to the proceeding within 30 days from the date of the certification of the results of such election, conduct a run-off election. In such run-off election, the board may drop from the ballot the name of the representative that received the least number of votes at the original election, or the privilege of voting against any representative when the least number of votes cast at the first election was against representation by any named representative.

(4) Questions concerning the determination of collective bargaining units or representation of employes may be raised by petition of any employe or his employer (or the representative of either of them). When it appears by the petition that any emergency exists requiring prompt action, the board shall act upon said petition forthwith and hold the election requested within such time as will meet the requirements of the emergency presented. The fact that one election has been held shall not prevent the holding of another election among the same group of employes, provided that it appears to the board that sufficient reason therefor exists.

111.06 What are unfair labor practices. (1) It shall be an unfair labor practice for an employer individually or in concert with others:

(a) To interfere with, restrain or coerce his employes in the exercise of the rights guaranteed in section 111.04.

(b) To initiate, create, dominate or interfere with, the formation or administration of any labor organization or contribute financial support to it, provided that an employer shall not be prohibited from reimbursing employes at their prevailing wage rate for time spent conferring

ing unit, or to enter into an all-union agreement except in the manner provided in subsection (1) (c) of this section.

(f) To violate the terms of a collective bargaining agreement (including an agreement to accept an arbitration award).

(g) To refuse or fail to recognize or accept as conclusive of any issue in any controversy as to employment relations the final determination (after appeal, if any) of any tribunal having competent jurisdiction of the same or whose jurisdiction the employer accepted.

(h) To discharge or otherwise discriminate against an employe because he has filed charges or given information or testimony in good faith under the provisions of this chapter.

(i) To deduct labor organization dues or assessments from an employe's earnings, unless the employer has been presented with an individual order therefor, signed by the employe personally, and terminable at the end of any year of its life by the employe giving at least thirty days written notice of such termination.

(j) To employ any person to spy upon employes or their representatives respecting their exercise of any right created or approved by this chapter.

(k) To make, circulate or cause to be circulated a black-list as described in section 343.682.

(l) To commit any crime or misdemeanor in connection with any controversy as to employment relations.

(2) It shall be an unfair labor practice for an employe individually or in concert with others:

(a) To coerce or intimidate an employe in the enjoyment of his legal rights, including those guaranteed in section 111.04, or to intimidate his family, picket his domicile, or

injure the person or property of such employe or his family.

(b) To coerce, intimidate or induce any employer to interfere with any of his employes in the enjoyment of their legal rights, including those guaranteed in section 111.04, or to engage in any practice with regard to his employes which would constitute an unfair labor practice if undertaken by him on his own initiative.

(c) To violate the terms of a collective bargaining agreement (including an agreement to accept an arbitration award).

(d) To refuse or fail to recognize or accept as conclusive of any issue in any controversy as to employment relations the final determination (after appeal, if any) of any tribunal having competent jurisdiction of the same or whose jurisdiction the employes or their representatives accepted.

(e) To cooperate in engaging in, promoting or inducing picketing (not constituting an exercise of constitutionally guaranteed free speech), boycotting or any other overt concomitant of a strike unless a majority in a collective bargaining unit of the employes of an employer against whom such acts are primarily directed have voted by secret ballot to call a strike.

(f) To hinder or prevent, by mass picketing, threats, intimidation, force or coercion of any kind the pursuit of any lawful work or employment, or to obstruct or interfere with entrance to or egress from any place of employment, or to obstruct or interfere with free and uninterrupted use of public roads, streets, highways, railways, airports, or other ways of travel or conveyance.

(g) To engage in a secondary boycott; or to hinder or prevent, by threats, intimidation, force, coercion or sabotage, the obtaining, use or disposition of materials, equip-

obedience to the subpoena of the board on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture under the laws of the state of Wisconsin; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, before the board in obedience to a subpoena issued by it; provided, that an individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

Any person who shall wilfully and unlawfully fail or neglect to appear or testify or to produce books, papers and records as required, shall, upon application to a circuit court, be ordered to appear before the board, there to testify or produce evidence if so ordered, and failure to obey such order of the court may be punished by the court as a contempt thereof.

Each witness who shall appear before the board by its order or subpoena shall receive for his attendance the fees and mileage provided for witnesses in civil cases in courts of record, which shall be audited and paid by the state in the same manner as other expenses are audited and paid, upon the presentation of properly verified vouchers approved by the chairman of the board and charged to the proper appropriation for the board.

(3) A full and complete record shall be kept of all proceedings had before the board, and all testimony and proceedings shall be taken down by the reporter appointed by the board. Any such proceedings shall be governed by the rules of evidence prevailing in courts of equity and the party on whom the burden of proof rests shall be required to sustain such burden by a clear and satisfactory preponderance of the evidence.

(4) After the final hearing the board shall promptly make and file its findings of fact upon all of the issues involved in the controversy, and its order, which shall state its determination as to the rights of the parties. Pending the final determination by it of any controversy before it the board may, after hearing make interlocutory findings and orders which may be enforced in the same manner as final orders. Final orders may dismiss the charges or require the person complained of to cease and desist from the unfair labor practices found to have been committed, suspend his rights, immunities, privileges or remedies granted or afforded by this chapter for not more than one year, and require him to take such affirmative action, including reinstatement of employees with or without pay, as the board may deem proper. Any order may further require such person to make reports from time to time showing the extent to which it has complied with the order.

(5) The board may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the board as a body to review the findings or order. If no petition is filed within twenty days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last-known address of the parties in interest, such findings or order shall be considered the findings or order of the board as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the board shall run from the time that notice of such reversal or modification is mailed to the last-known address of the parties in

interest. Within ten days after the filing of such petition with the board, the board shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the board is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another twenty days for filing a petition with the board.

(6) The board shall have the power to remove or transfer the proceedings pending before a commissioner or examiner. It may also, on its own motion, set aside, modify or change any order, findings or award (whether made by an individual commissioner, an examiner, or by the board as a body) at any time within twenty days from the date thereof if it shall discover any mistake therein, or upon the grounds of newly discovered evidence.

(7) If any person fails or neglects to obey an order of the board while the same is in effect the board may petition the circuit court of the county wherein such person resides or usually transacts business for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court its record in the proceedings, including all documents and papers on file in the matter, the pleadings and testimony upon which such order was entered, and the findings and order of the board. Upon such filing the board shall cause notice thereof to be served upon such person by mailing a copy to his last known post office address, and thereupon the court shall have jurisdiction of the proceedings and of the question determined therein. Said action may thereupon be brought on for hearing before said court upon said record by the board serving ten days written notice upon the respondent; subject, however, to provisions of

law for a change of the place of trial or the calling in of another judge. Upon such hearing the court may confirm, modify, or set aside the order of the board and enter an appropriate decree. No objection that has not been urged ~~before~~ the board shall be considered by the court unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of fact made by the board, if supported by credible and competent evidence in the record, shall be conclusive. The court may, in its discretion, grant leave to adduce additional evidence where such evidence appears to be material and reasonable cause is shown for failure to have adduced such evidence in the hearing before the board. The board may modify its findings as to facts, or make new findings by reason of such additional evidence, and it shall file such modified or new findings with the same effect as its original findings and shall file its recommendations, if any, for the modification or setting aside of its original order.

The court's judgment and decree shall be final except that the same shall be subject to review by the supreme court in the same manner as provided in section 102.25.

(8) The order of the board shall also be subject to review in the manner provided in chapter 227, except that the place of review shall be the circuit court of the county in which the appellant or any party resides or transacts business.

(10) Commencement of proceedings under subsection (7) shall, unless otherwise specifically ordered by the court, operate as a stay of the board's order.

(11) Petitions filed under this section shall have preference over any civil cause of a different nature pending in the circuit court, shall be heard expeditiously, and the cir-

cuit courts shall always be deemed open for the trial thereof.

(12) A substantial compliance with the procedure of this chapter shall be sufficient to give effect to the orders of the board, and they shall not be declared inoperative, illegal, or void for any omission of a technical nature in respect thereto.

(13) A transcribed copy of the evidence and proceedings or any part thereof on any hearing taken by the stenographer appointed by the board, being certified by such stenographer to be a true and correct transcript, carefully compared by him with his original notes, and to be a correct statement of such evidence and proceedings, shall be received in evidence with the same effect as if such reporter were present and testified to the fact so certified. A copy of such transcript shall be furnished on demand free of cost to any party (all of the members of a single organization being considered a single party).

(14) The right of any person to proceed under this section shall not extend beyond one year from the date of the specific act or unfair labor practice alleged.

111.08 Financial reports to employees. Every person acting as the representative of employees for collective bargaining shall keep an adequate record of its financial transactions and shall present annually to each member within sixty days after the end of its fiscal year a detailed written financial report thereof in the form of a balance sheet and an operating statement. In the event of failure of compliance with this section, any member may petition the board for an order compelling such compliance. An order of the board on such petition shall be enforceable in the same manner as other orders of the board under this chapter.

111.09 Board shall make rules, regulations and orders.

The board may adopt reasonable and proper rules and regulations relative to the exercise of its powers and authority and proper rules to govern its proceedings and to regulate the conduct of all elections and hearings. Such rules and regulations shall not be effective until ten days after their publication in the official state paper.

111.10 Arbitration. Parties to a labor dispute may agree in writing to have the board act or name arbitrators in all or any part of such dispute, and thereupon the board shall have the power so to act. The board shall appoint as arbitrators only competent, impartial and disinterested persons. Proceedings in any such arbitration shall be as provided in chapter 298 of the statutes.

111.11 Mediation. The Board shall have power to appoint any competent, impartial, disinterested person to act as mediator in any labor dispute either upon its own initiative or upon the request of one of the parties to the dispute. It shall be the function of such mediator to bring the parties together voluntarily under such favorable auspices as will tend to effectuate settlement of the dispute, but neither the mediator nor the board shall have any power of compulsion in mediation proceedings. The board shall provide necessary expenses for such mediators as it may appoint, order reasonable compensation not exceeding ten dollars per day for each such mediator, and prescribe reasonable rules of procedure for such mediators.

Where the exercise of the right to strike by employees of any employer engaged in the state of Wisconsin in the production, harvesting or initial processing (the latter after leaving the farm) of any farm or dairy product produced in this state would tend to cause the destruction or serious deterioration of such product, the employees shall give to

the board at least ten days notice of their intention to strike and the board shall immediately notify the employer of the receipt of such notice. Upon receipt of such notice, the board shall take immediate steps to effect mediation, if possible. In the event of the failure of the efforts to mediate, the board shall endeavor to induce the parties to arbitrate the controversy.

111.12 Duties of the attorney-general and district attorneys. Upon the request of the board, the attorney-general or the district attorney of the county in which a proceeding is brought before the circuit court for the purpose of enforcing or reviewing an order of the board shall appear and act as counsel for the board in such proceeding and in any proceeding to review the action of the circuit court affirming, modifying or reversing such order.

111.13 The board shall appoint an advisory committee consisting of one member of the board who shall represent the general public and who shall act as chairman, and an equal number of representatives of employees and employers. In selecting the representatives of employees, the board shall give representation to organizations representing labor unions both affiliated and nonaffiliated; and in selecting representatives of employers it shall give representation to employers in agricultural, industrial and commercial pursuits. The board may refer to such committee for its study and advice any matter having to do with the relations of employers and employees. Such committee shall give consideration to the practical operation and application of this subchapter and may make recommendations with respect to amendments of this subchapter and shall report to the proper legislative committee its view on any pending bill relating to this subchapter. Regular meetings of such committee shall be held on the first Mon-

day of each alternate month following the effective date of this amendment (1947). Special meetings of the committee may be called at other times by the board. Members of the advisory committee shall receive no salary or compensation for service on said committee, but shall be entitled to reimbursement for necessary expenses.

111.14 Penalty. Any person who shall wilfully assault, resist, prevent, impede or interfere with any member of the board or any of its agents or agencies in the performance of duties pursuant to this chapter shall be punished by a fine of not more than five hundred dollars or by imprisonment in the county jail for not more than one year, or both.

111.15 Construction of this chapter. Except as specifically provided in this chapter, nothing therein shall be construed so as to interfere with or impede or diminish in any way the right to strike or the right of individuals to work; nor shall anything in this chapter be so construed as to invade unlawfully the right to freedom of speech. And nothing in this chapter shall be so construed or applied as to deprive any employe of any unemployment benefit which he might otherwise be entitled to receive under chapter 108 of the statutes.

111.16 Existing contracts unaffected. Nothing in this chapter shall operate to abrogate, annul, or modify any valid agreement respecting employment relations existing on the effective date hereof.

111.17 Conflict of provisions; effect. Wherever the application of the provisions of other statutes or laws conflict with the application of the provisions of this chapter this chapter shall prevail, provided that in any situation where the provisions of this chapter cannot be validly enforced, the provisions of such other statutes or laws shall apply.

111.18 Separability of provisions. If any provision of this chapter or the application of such provision to any person or circumstances shall be held invalid the remainder of this chapter or the application of such provision to persons or circumstances other than those as to which it is held invalid shall not be affected thereby.

111.19 Title of chapter. This chapter may be cited as the "Employment Peace Act".

Effective Date: May 5, 1939.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1948.

Nos. 14 and 15.

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Respondents.

PETITIONERS' REPLY BRIEF.

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INDEX.

	Page
Argument	2

I.

The Judgment Is Inconsistent With and Contrary to the Declared Policy and Purposes of the Federal Act as Well as in Conflict With Its Provisions.....	2
---	---

There can be good faith bargaining only if employees can bring comparatively equal economic power to the bargaining table.....	2
--	---

The purpose of the strike was to encourage real collective bargaining	5
---	---

II:

There Was No Attempt Here to Gain Unilateral Control Over Employment or Production.....	7
---	---

The Board's order was not based upon any attempt to gain unauthorized possession.....	7
---	---

The right to strike is protected but the right to reinstatement is a matter for determination by the National Labor Relations Board.....	8
--	---

III.

The Order Comprehends More Than Instigation of the Activities and Includes Participation.....	13
---	----

The opinion of the Wisconsin Supreme Court confirms that the order includes participation	13
---	----

If the employees may participate in the activities they may instigate them.....	14
---	----

IV.

Section 111.06 (2) (e), Wisconsin Statutes, Is Involved in This Case.....	14
The finding of violation of Section 111.06 (2) (e) results in forfeiture of constitutional rights.....	14

V.

Reply to Respondents' Argument on the Jurisdictional Question.....	17
The National Labor Relations Board assumed jurisdiction over the employer's employment relationship generally	17
The employer is in interstate commerce within the meaning of the National Labor Relations Act	17
The test of jurisdiction is that Congress has evinced an intention to control and has established a procedure to administer control.....	18
Police power to invoke the criminal process of the state is not involved.....	19
Conclusion.....	20

Cases Cited.

American Steel Foundries v. Tri-City Central Trades Council, 257 U. S. 184, 209.....	3, 6
Home Beneficial Life Insurance Co. v. National Labor Relations Board, 159 Fed. (2d) 280.....	12
National Labor Relations Board v. Columbian Enameling & Stamping Co., 306 U. S. 292.....	8, 9
National Labor Relations Board v. Draper Corp., 145 Fed. (2d) 199.....	12
National Labor Relations Board v. Fansteel Metallurgical Corporation, 306 U. S. 240, 256.....	6, 7, 8, 9, 10

National Labor Relations Board v. Jones & Laughlin Steel Corporation, 301 U. S. 1, 34.....	3
National Labor Relations Board v. Mackay Radio and Telegraph Company, 304 U. S. 333.....	5, 7
National Labor Relations Board v. Sands Mfg. Co., 306 U. S. 332.....	9
Southern Steamship Co. v. N. L. R. B., 316 U. S. 31....	9

Statutes Cited

Wisconsin Statutes:

Sec. 103.53	14
Sec. 111.06 (2) (e).....	14, 16

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1948.

Nos. 14 and 15.

INTERNATIONAL UNION, UNITED AUTOMOBILE WORKERS OF AMERICA, A. F. of L., LOCAL 232; ANTHONY DORIA, CLIFFORD MATCHEY, WALTER BERGER, ERWIN FLEISCHER, JOHN M. CORBETT, OLIVER DOSTALER, CLARENCE EHLMANN, HERBERT JACOBSEN, LOUIS LASS, Petitioners,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, HENRY RULE and J. E. FITZGIBBON, as Members of the Wisconsin Employment Relations Board; and BRIGGS & STRATTON CORPORATION, a Corporation, Respondents.

PETITIONERS' REPLY BRIEF.

While petitioners in their first brief have already anticipated in some measure the brief of respondents, this reply brief is filed because it appears to petitioners that respondents, particularly the respondent Board and some of the Amici Curiae, seek to avoid reversal of the judgment by minimizing the language and judgment of the Order as-
sailed, and seek to justify the judgment on the basis of some alleged national policy expressed in the federal act, which policy it is asserted militates against any finding in this case that the judgment is in conflict with the National Labor Relations Act in its original form or as amended.

ARGUMENT.

I.

The Judgment Is Inconsistent With and Contrary to the Declared Policy and Purposes of the Federal Act as Well as in Conflict With Its Provisions.

One of the principal arguments made by respondents and Amici Curiae is that the activities herein involved are such that they are contrary to and defeat the purposes and policy of the National Labor Relations Act. The argument runs somewhat like this: the Act was meant to encourage good faith collective bargaining and to discourage interruptions of production with might affect interstate commerce, and therefore, the restraint of the stoppages herein is consistent with the Act.

It must be conceded, of course, that one of the declared purposes of the federal act is to encourage good faith collective bargaining for the purpose of preventing, insofar as possible, interruptions which might have an undesirable effect upon the flow of commerce. But to argue that, therefore, work stoppages are contrary to the policy or purposes of the Act is to argue that all strikes should be abolished and abandoned regardless of what form or nature they may take. The express language of Sections 7 and 13 of the Act belies such construction. The Congress obviously had no such intention in mind when the Act was passed.

What respondents and Amici Curiae have overlooked completely is the fact that there can be no good faith collective bargaining unless the employees can lay their collective economic strength on the table alongside the corporate economic strength of the employer, and in this way

meet and treat with the employer on a comparatively equal basis. This was expressly recognized in the case of **American Steel Foundries v. Tri-City Central Trades Council**, 257 U. S. 184, 209, wherein it was pointed out that:

"Union was essential to give laborers an opportunity to deal on equality with their employer. They united to exert influence upon him and to leave him in a body, in order, by this inconvenience, to induce him to make better terms with them. They were withholding their labor of economic value to make him pay what they thought it was worth. The right to combine for such a lawful purpose, has, in many years, not been denied by any Court. The strike became a lawful instrument in a lawful economic struggle."

And in the case of **National Labor Relations Board v. Jones & Laughlin Steel Corporation**, 301 U. S. 1, 34, this Court pointed out that Congress expressly safeguarded the legality of collective action which had become a generally recognized right.

Section 1 of the National Labor Relations Act, setting forth the Congressional findings and policies, emphasizes "the inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract" which results, not in strikes, but "recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries." It was, therefore, "declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce" not only "by encouraging the practices and procedure of collective bargaining," but also "by protecting the exercise by workers of full freedom of association . . . for the purpose of

negotiating the terms and conditions of their employment or other mutual aid or protection."

In other words, the underlying policy of the National Labor Relations Act was to enable working men, free from interference on the part of the employer or the state; to so strengthen their bargaining position that they would have a more nearly equal voice in establishing their wages, hours, and working conditions and to, if necessary, engage in such concerted activities, including strikes, which would assure them of such bargaining power.

The only type of strike which might run counter to the policy of the law would be the organizational type of strike which results from a refusal on the part of management to recognize the designated representative of a majority of its employees. That type of strike was discouraged by establishing procedure for the determination of collective bargaining representatives by the National Labor Relations Board (Sec. 9), and by restricting any effort on the part of the employer to interfere with his employees in the exercise of their right of self-association, whether such interference be by aiding or encouraging one labor organization as against another or by discriminating against employees who seek to exercise their right to form, join, and assist labor organizations [Secs. 8 (a) (1), (2) and (3)].

However, even the so-called "recognition strike" was not outlawed or banned by the National Labor Relations Act by virtue of Section 13. Nor was it outlawed by the amended National Labor Relations Act except in those cases where there is a certified bargaining agent [Sec. 8 (b) (4) (C)].

Any argument, therefore, that work stoppages while collective bargaining is going on are neither protected by

the National Labor Relations Act nor consistent with the purposes and policies of the Act is completely untenable.

Nor is there any merit to the suggestion of Amici Curiae and respondents that these series of strikes during the course of collective bargaining negotiations are an attempt to avoid or evade good faith collective bargaining. On the contrary, the strikes were for the purpose of encouraging the making of a collective bargaining agreement in circumstances where an employer had refused to accept the recommendations of a Tri-Partite Panel established and appointed by the National War Labor Board, had refused to comply with an order of the Regional War Labor Board, and, after January 1, 1946, had refused to comply with the final order of the National War Labor Board. These refusals related not only to those matters which the Company thought might be unlawful under Wisconsin law, but to all other matters of an economic nature which are unaffected by Wisconsin law, such as grievance procedure, wages, etc. (R. 43).

The Company boldly took the position in these proceedings that "because the war had ceased we did not believe we were morally or legally obliged to comply with such order." (R. 41).

This Court pointed out in the case of **National Labor Relations Board v. Mackay Radio and Telegraph Company**, 304 U. S. 333, that

"The wisdom or unwisdom of the men, their justification or lack of it, in attributing to respondent an unreasonable or arbitrary attitude in connection with the negotiations, cannot determine whether, when they struck, they did so as a consequence of or in connection with a current labor dispute."

And as petitioners have pointed out in their original brief, the right to strike in a dispute over wages, hours and working conditions remains unaffected by the Labor Management Relations Act of 1947, one of the authors of that Act stating expressly that it "recognizes freedom to strike when the question involved is the improvement of wages, hours and working conditions, when a contract has expired and neither side is bound by a contract." 93 Cong. Rec. 3950, 3951 (1947).

The strikes in this case were to encourage good faith collective bargaining rather than to discourage it. The strikes occurred while collective bargaining was going on and because of dissatisfaction with the progress being made. The employees withheld their services in the hope "by this inconvenience to induce him (the employer) to make better terms with them." **American Steel Foundries** case, supra. And to "exert pressure recognized as lawful." **National Labor Relations Board v. Fansteel Metallurgical Corporation**, 306 U. S. 240, 256.

There is no suggestion in this record that the activities engaged in by the employees were arbitrary, capricious or whimsical, or that such activities were motivated by other than an honest desire on their part to conclude what they considered to be a fair and reasonable collective bargaining agreement.

Such activities, therefore, are not only protected by the very language of the National Labor Relations Act, but fall squarely within the declared purposes and policies of the Act—particularly that policy which recognizes that recurrent business depressions can be avoided only if employees can collectively prevent the depression of their wage rates or their purchasing power, and foster stabilization of competitive wage rates and working conditions.

within and between industries, by combining and acting for their mutual aid and protection.

II.

There Was No Attempt Here to Gain Unilateral Control Over Employment or Production.

There is again asserted in the briefs of respondents and Amici Curiae that the particular tactics involved here were attempts to exert unilateral control over the means of production, since there was no intent on the part of the employees to absolutely quit their employment, but a hope to return. It is also suggested that this tactic can be compared with the sitdown strikes so severely condemned by the Court in the **Fansteel** case, *supra*.

Petitioners have already met this argument at pages 41 through 46 of their original brief wherein it was pointed out that neither the State Board nor the State Court based their order upon any such concept nor did they rely upon the "unauthorized possession" part of the statute to support the judgment. The controlling feature, insofar as the State Board and Court were concerned, was the interruption of production in the absence of a state-defined strike. We also pointed out that the employer was not without recourse or remedy, although the question was not involved in this case, in that the employer could, under the decisions of this Court, particularly in the **Mackay** case, *supra*, replace the economic strikers or could, in the alternative, close down the plant and compel the full-time strike which petitioners were seeking to avoid.

The argument of respondents and Amici Curiae in this respect, if carried to its logical extreme, would mean that if in a full-time strike the labor market in a particular area is such that replacement of strikers cannot easily

take place, this condition would result in outlawing of that full-time strike because, in those circumstances, the employer is deprived of the manpower to make the means of production of use to him. Surely, the test of legality of an off-the-premise work-stoppage is not dependent upon the case of replacing the absent employees.

There is nothing in this case which is at all suggestive of the situation with which this Court dealt so strongly in the **Fansteel** case where the employees took physical possession of property belonging to the employer and defied, by violence, the law enforcement officers of the state who sought to eject them as trespassers. In the instant case on each occasion the employer had full and free possession of its property to do with as it saw fit.

This argument of respondents and Amici Curiae merely serves to emphasize that which petitioners claim, and that is, that here the State seeks to compel the employees to remain on the job or to quit entirely but will not permit a leaving with an intent to return.

Whether the employer may, instead of replacing or locking out the striking employees, discharge such employees for breach of company rules, is not involved in this case. Had the company sought to make such discharges, the matter would then have been submitted to the National Labor Relations Board for determination. Petitioners would then argue that there could be replacement, but no discharge insofar as these economic strikers are concerned. Conceivably, the Board might hold that while these activities were protected activities under the Act, there would be no reinstatement or that reinstatement would be an abuse of discretion under the circumstances in view of the decisions of this Court in **National Labor Relations Board v. Columbian Enameling & Stamp-**

ing Co., 306 U. S. 292; **National Labor Relations Board v. Sands Mfg. Co.**, 306 U. S. 332; **Southern Steamship Co. v. N. L. R. B.**, 316 U. S. 31, and **National Labor Relations Board v. Fansteel**, supra. These cases, however, went no further to hold than that the Board abused the discretionary powers placed in it by directing reinstatement of economic strikers under the particular circumstances of these cases. The cases did not hold that the concerted activities did not otherwise fall within the protection of the law.

In the **Columbian Enameling & Stamping Co.** case, supra, the decision turned upon the Court's disagreement with the Board on the question of whether there was a refusal to bargain in violation of the law. Justices **Black** and **Reed** dissented.

In the **Sands Mfg. Co.**, Case, supra, the Court disagreed with the Board's holding that the employees had been locked out for the purpose of discriminating in derogation of rights under the law, and similarly rejected the Board's findings that the company had refused to bargain collectively. The Court found that the strike, being in violation of contract, was in the nature of an absolute quit, and that the company, therefore (p. 344) "was at liberty to treat them as having severed their relations with the company because of their breach and to consummate their separation from the company's employ by hiring others to take their places." Justices **Black** and **Reed** dissented.

It is to be noted, that in the instant case there was no contract and hence there could be no breach of contract.

In the **Southern Steamship Case**, supra, the Court was confronted with a strike which violated the Federal Mutiny Statute. The strikers while in the service of the employer not only refused to perform their duties but remained on

Board their ship and so deprived the owners and officers of control. The Court pointed out that this situation differed from that in an industrial plant where "the employer is confronted only with the necessity of placing new men at the machines."

The decision of the Court was based upon those controlling factors, and went only to the validity of the order of the Board which directed reinstatement of the mutineers. The Court also held, however, that, even though reinstatement was not an appropriate remedy under the circumstances, other means of redress were available under the National Labor Relations Act and the Court concluded by stating (p. 48):

"And what is more, nothing that we have said would prevent the union from striking, picketing or resorting to any other means of self-help, so long as the time and place it chooses do not come within the express prohibition of Congress."

Part of the Board's order directing the employer to comply with the provisions of the Act was sustained.

Justices Reed, Black, Douglas, and Murphy dissented, during the course of which dissent it was pointed out that the decision in the **Fansteel** Case went solely upon the commission of serious crime, and that in the **Fansteel** Case all that was held was that the Board had exceeded the limits of its discretion in directing reinstatement of the sitdown strikers because of the "extremities of conduct which leave no discretion to the Board."

And the **Fansteel** Case, *supra*, recognizes the right to strike,—“that the employees could lawfully cease work at their own volition because of the failure of the employer to meet their demands,”—that employees could quit

their work "in the exercise of pressure recognized as lawful,"—but that where employees engage in criminal acts they accept "the risk of the termination of their employment upon grounds aside from the exercise of the legal rights which the statute was designed to conserve."

The Court then concluded that the Board abused its discretion in directing reinstatement "after discharge for illegal acts."

In the concurring opinion of Justice Stone it was pointed out that the law affords no protection from termination of the employee-employer relationship "for reasons dissociated with the stoppage of work." And Justice Stone thought that as to the 14 employees who were not actually discharged by the employer, although they aided and abetted the sitdown strike, the Board did have the discretion to direct their reinstatement.

Justices Reed and Black dissented in part holding that under the circumstances the Board did not improperly exercise its discretion in directing reinstatement of strikers who had gone out on strike because of employer unfair labor practices, even though during the course of such strike criminal activities had been engaged in.

It is apparent from these cases that the right to strike or work stoppages as such were not held to be outside of the protection of the National Labor Relations Act, but only that reinstatement of strikers had to be conditioned upon and subject to the attendant circumstances of the strike, and upon a determination of whether there was an actual severance of the employment relationship.

The mere fact that the employees here hoped to find their jobs available to them when they returned the following day cannot be stretched to reasonable comparison of the stoppages to sitdowns, mutinies or breaches of contract.

These same observations can be made with respect to the lower court cases cited by respondents and Amici Curiae.

For example, the case of **National Labor Relations Board v. Draper Corp.**, 145 Fed. (2d) 199, cited by respondent Board, did not involve the question of whether the right to strike was protected under the National Labor Relations Act, but only the question of whether or not the employer had a right to discharge employees who struck during the course of negotiations and without the authority of the collective bargaining representative who was then representing them in negotiations. The Court said expressly:

“What is involved here, however, is not the right to strike, but the right of the employer to discharge employees who have engaged in insubordinate conduct violative of the statutory provisions for collective bargaining.”

Similarly, the case of **Home Beneficial Life Insurance Co. v. National Labor Relations Board**, 159 Fed. (2nd) 280, did not involve the type of situation which was here involved. In that case the employees did not quit their jobs completely for limited periods of time, but performed all the duties of their job, except the one duty of reporting to their offices in the morning. The case would be analogous only if here the employees stayed on the job, did everything else required of them, but refused to perform a certain operation. That, of course, was not the situation. In no case cited by respondents or Amici Curiae has any court held that the right to strike was not guaranteed or preserved by the National Labor Relations Act. In those cases, all that was involved was whether or not reinstatement would serve the purposes of the Act under the particular circumstances of the case.

III.

The Order Comprehends More Than Instigation of the Activities and Includes Participation.

The respondent board in answering the constitutional questions raised herein urges that actual "participation" in the activities is not covered by the judgment but rather only "instigation."

However, paragraph (a) of the order comprehends both. By the order the petitioners, including the union, are directed to cease and desist from two activities: (1) engaging in any concerted efforts to interfere with production by arbitrarily calling union meetings, and inducing work stoppages during regularly scheduled working hours; and (2) engaging in any other concerted activities to interfere with the production of the complainant except by leaving the premises in an orderly manner for the purpose of going on strike.

The second provision of paragraph (a) of the cease and desist order clearly covers participation by all employees in the leaving of the premises unless such leaving squares with the Wisconsin definition of strike.

And we have the word of the Wisconsin Court that this is so since the Court stated flatly "what (a) does, and all that it does, is to ban the individual defendants **and the members of the union** from 'engaging in concerted effort' to interfere with production by doing the acts instantly involved" (R. 113). (Emphasis ours.)

We have already pointed out in our original brief at page 55 that in Wisconsin a Union has no existence independent of its membership and that what is forbidden to the Union is forbidden to its members.

Finally, even if the order were limited to instigation and not participation, this would not, in our opinion, alter

the application of the constitutional provisions, since it surely must follow that if the employees of the respondent corporation have the right collectively to do that which was done here under the constitution of the United States, then such employees individually, collectively, or through their duly designated agents, may instigate or induce such activities.

IV.

Section 111.06 (2) (e), Wisconsin Statutes, Is Involved in This Case.

The respondent Board again asserts that Section 111.06 (2) (e) does not support the order and that the Board did not in fact base any remedy upon alleged violation of that section. It is argued that the only significance to be given to the state court's reliance upon Section 111.06. (2) (e) is that violation of this Section may give rise to other proceedings based upon such violation.

As we understand the argument of the state, it is urged that having found a violation of Section 111.06 (2) (e), the result is to deprive petitioners of the right to engage in those acts which are enumerated in Section 103.53 of the Wisconsin Statutes.

This Section of the Wisconsin Statutes follows the Norris-LaGuardia Act very carefully and very closely. It provides (Sec. 103.53):

“(1) The following acts, whether performed singly or in concert, shall be legal:

“(a) Ceasing or refusing to perform any work or to remain in any relation of employment regardless of any promise, undertaking, contract or agreement in violation of the public policy declared in Section 103.52;

“(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in Section 103.52;

“(c) Paying or giving to, any person any strike or unemployment benefits or insurance or other moneys or things of value;

“(d) By all lawful means aiding any person who is being proceeded against in, or is prosecuting any action or suit in any court of the United States or of any state;

“(e) Giving publicity to and obtaining or communicating information regarding the existence of, or the facts involved in, any dispute, whether by advertising, speaking, patrolling any public street or any place where any person or persons may lawfully be, without intimidation or coercion, or by any other method not involving fraud, violence, breach of the peace, or threat thereof;

“(f) Ceasing to patronize or to employ any person or persons, but nothing herein shall be construed to ~~legalize a secondary boycott~~;

“(g) Assembling peaceably to do or to organize to do any of the acts heretofore specified or to promote lawful interests;

“(h) Advising or notifying any person or persons of an intention to do any of the acts heretofore specified;

“(i) Agreeing with other persons to do or not to do any of the acts heretofore specified;

“(j) Advising, urging, or inducing without fraud, violence, or threat thereof, others to do the acts heretofore specified, regardless of any such undertaking or promise as is described in Section 103.52; and

"(k) Doing in concert any or all of the acts heretofore specified shall not constitute an unlawful combination or conspiracy;

"(1) Peaceful picketing or patrolling, whether engaged in singly or in numbers, shall be legal.

"(2) No court, nor any judge or judges thereof shall have jurisdiction to issue any restraining order or temporary or permanent injunction which, in specific or general terms, prohibits any person or persons from doing, whether singly or in concert, any of the foregoing acts."

If, as is asserted by the State, the finding of violation of Section 111.06 (2) (e) in this case has no significance other than to result in forfeiture of the rights which are enumerated above, then surely the law is unconstitutional and void.

Examination of the acts which may now become unlawful because of finding of violation of 111.06 (2) (e) demonstrate clearly that here there is a restraint on the right to picket, free speech, lawful assemblage, etc. For all of the reasons previously set forth in petitioners' original brief, the order, insofar as it is based on 111.06 (2) (e) and the statute itself, are illegal, void, and of no effect whatsoever because they make the exercise of these basic constitutional rights dependent upon the majority vote.

The fact remains that 111.06 (2) (e) is in this case upon the insistence of the Attorney General and by the exact language of the Supreme Court of the State of Wisconsin. Whether it is in the case as a basis for restraint of continuation of the strikes herein involved, or whether it is here because it carries with it restraints on other types of activities in connection with those strikes, is immaterial. On either score it is void.

Reply to Respondents' Argument on the Jurisdictional Question.

The respondent Board points out that Wisconsin has consistently followed the "case by case" method of determining jurisdiction in matters involving or growing out of labor relations. It is precisely this "case by case" method which has been rejected by this honorable court in the **Bethlehem Steel** case.

Argument is then made that it is not in every case that the National Labor Relations Board will take jurisdiction, and that since jurisdiction was not taken in this particular case with respect to these particular unfair labor practices, the state was free to go ahead. However, the State over-simplifies the argument and overlooks some of the pertinent facts.

In the first place, the National Labor Relations Board did assume jurisdiction over the employment relationship generally and certified the petitioning union as the collective bargaining agent (R. 33, 40). In order for the Board to do this it must have found that the dispute over representation would affect or involve interstate commerce. If a dispute over representation would affect or involve interstate commerce, then surely strikes involving virtually all of the employees would similarly affect interstate commerce.

In the second place, the state overlooks the fact that both the company and the union entered into a stipulation that the company was "engaged in interstate commerce under the terms of the National Labor Relations Act" (R. 43).

In the third place, the state offers no suggestion of how it can be determined whether or not the National Labor

Relations Board would accept jurisdiction in a particular case. Apparently, it is the state's position that in order to avail one's self of the jurisdictional bar in state board proceedings, one party or the other immediately upon the service of a state complaint must go to the National Labor Relations Board and file a similar complaint and then wait the determination of the National Labor Relations Board as to whether or not it will act on that similar complaint, and probably also wait until it is determined in which way the National Board will act. In the meantime, the State Labor Board proceedings are held in abeyance. Then, if the National Board refuses to act, the state board proceedings go ahead.

Surely there is no other way to determine in a particular case whether or not the National Labor Relations Board will act, nor in what way it will act, aside from our experience as to whether or not it usually does act under same or similar circumstances. It is precisely because of this that the "case by case" method was rejected by this Court in the **Bethlehem** case.

The state makes the further argument that the National Labor Relations Act as amended does not cover this particular type of tactic. It is submitted that the question is not whether the National Labor Relations Act relates specifically to this particular type of tactic, but whether or not Congress has evinced an intention to assume general and exclusive control over unfair labor practices on the part of employees and their labor unions, and has prescribed a way and method in which those unfair labor practices are to be handled by the administrative agency.

Congress, through enactment of the Labor Management Relations Act, has definitely proscribed certain concerted activities, whether they be called strikes or stoppages of work. The proscriptions are contained in Section 8 (b) (4)

of the Act. The inescapable inference, particularly in view of the language of Section 7 and Section 13, is that all other activities not so proscribed are recognized as legitimate exercises of the concerted activities under the national law.

With respect to matters such as violence, mass picketing or obstructions of the street, it can safely be assumed that those matters remain within the control of the states, since those never have been considered permitted activities under the federal law. The real answer would seem to be that activities which in and of themselves are not in violation of ordinary criminal laws and are not proscribed by Section 8 (b), fall within the protection of the national Act and are free from restraint by the state; but activities involving violence, mass picketing, obstructions, breaches of the peace, crimes and similar matters remain subject to state control since they do not fall within the contemplation of Sections 7 and 13.

Petitioners again emphasize that the activities in the instant case were not found to be unlawful, either because of their nature, their frequency or lack of orderliness, but only because they interfered with production and did not fall within the state definition of "strike." There, therefore, is not here involved the right of the state to handle on an administrative level those matters which would be subject to the criminal processes of the state. There is not here involved a type of activity which, because of its very nature is excluded from the protection of Sections 7 and 13 of the Act. There is here involved only peaceful, orderly activities. They are not proscribed by Section 8 (b) of the federal Act. They are not otherwise unlawful under criminal statute or codes. They, therefore, must fall within the protection of Sections 7 and 13.

CONCLUSION.

Argument is made by the state and Amici Curiae that consistent with the scheme and purpose of the Wisconsin law to protect the interests of employes, employers and the public, the judgment herein must be affirmed. But there is a remarkable lack of showing how the interference with production in this type of case is any more prejudicial to those interests than that resulting from the concededly legal full-time, continuous strike. That there may be any greater prejudice to the public resulting from the orderly withdrawal from their place of employment by employees engaged in the manufacture of small gasoline engines and automobile keys in this type of strike, as distinguished from the prejudice resulting from the "greater quitting" involved in the continuous strike, is rather difficult to see.

Nor should the appeal to "Fair Play" strike any more responsive chord than the appeal of these employees struck in the corporate breast when request was made to put into practice the recommendations and directives of the United States Government.

The fact is that there was nothing more unfair about these activities than there is in any legitimate strike or other concerted activity. As long as in a free country and in a free economy workingmen are required to match their power to withhold their services against the economic withholding power of those who own the means of production in order to attain a fair share of the fruits of their labor, temporary inconvenience and hardship to all is the very small cost of freedom which all must willingly bear and share.

To yield support of this basic concept because the means of withholding services are either novel or unique, or be-

cause one particular employer may find it difficult to adequately cope with it, would be but the start of an encroachment which would soon result in complete destruction of basic civil rights and liberties, as well as destruction of the principles upon which our free economy is based.

It is submitted that this case does not present justification for such starting point, if indeed there ever can be such justification; and it is further submitted that no matter how desirable it may be to encourage "pragmatic regulation" by the state, such encouragement may not embrace the approval of regulation which is not only flatly contrary to the express federal legislative policy, but in violation of constitutional guarantees as well.

Respectfully submitted,

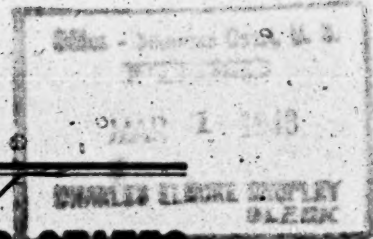
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

Nos. 580 and 581

INTERNATIONAL UNION, U.A.W.A., A.F. of L., LOCAL 232;
ANTHONY DORIA, CLIFFORD MATCHEY, WALTER
BERGER, ERWIN FLEISCHER, JOHN M. CORBETT,
OLIVER DOSTALER, CLARENCE EHRLMANN, HERBERT
JACOBSEN, LOUIS LASS,

Petitioners,

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WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E.
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of the Wisconsin Employment Relations Board; and BRIGGS &
STRATTON CORPORATION, a corporation,

Respondents.

Brief of
BRIGGS & STRATTON CORPORATION
IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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SUMMARY OF ARGUMENT

Page

I. The Decision Below Rests Purely Upon the Finding of Fact, Based on Substantial Evidence, That the Tactics Engaged in Were Not a Strike	1
A. Wisconsin Statute Involved	1
<i>Designates as an unfair labor practice the taking of unauthorized possession of employer's premises or engaging in concerted effort to interfere with production except by leaving the premises for the purpose of going on strike</i>	<i>2</i>
B. The Evidence Completely Supports the Board's Findings	2
1. The Facts Established that the Activities Engaged in Were Production Interferences Within the Exact Language of the Wisconsin Act.....	2
2. The Board Correctly Found on the Facts That the Activity Indulged in Was Not a Strike	6
a. The tactics used were not a strike within the general meaning of the term	6
b. The Wisconsin law as to what constitutes a strike accords with the general rule	11
c. The Board's finding of fact, supported by substantial evidence, is made conclusive by the Statute and will not be disturbed on appeal.....	15

II. The Wisconsin Statute Involved and the Order in Conformity Therewith Infringe No Constitutional or Federal Rights of Petitioners.....	18
A. The History and Terms of the Act Show the Purpose is to Protect Completely All Rights of Wisconsin Citizens.....	18
B. Nothing in the Constitution or Federal Law Prohibits the Reasonable Regulation Here Imposed.....	25
III. Conclusion	28

AUTHORITIES

Cases Cited

Baker v. W. U. T. Co., 134 Wis. 147.....	16
Bowe v. Gage, 127 Wis. 245.....	16
Cudahy Packing Co., 29 N.L.R.B. 837.....	8
C. G. Conn Limited v. National Labor Relations Board, 108 Fed. 2d 390.....	9
Harnischfeger Corp., 9 N.L.R.B. 676.....	8
Home Beneficial Life Ins. Co., 159 Fed. 2d 280 (4th CCA)	8
Mt. Clemens Pottery Co., 46 N.L.R.B. 714.....	8
National Labor Relations Board v. Fansteel Metallurgical Corp., 306 U.S. 240, 80 L. ed. 627.....	8, 19
National Protective Association of Steam Fitters and Helpers v. Cummings, 170 N. Y. 315.....	7
New York State L.R.B. v. Union Club of the City of New York, 266 App. Div. 516.....	8

	Page
Niles Firebrick Co., 30 N.L.R.B. 426.....	8
Retail Clerks' Union v. Wisconsin Employment Re- lations Board, 242 Wis. 21.....	16
Sandoval v. Industrial Commission, 110 Colo. 108, 130 Pac. 2d 930.....	11
Sharpe v. Hasey, 141 Wis. 79.....	16
Walter W. Oefflein, Inc. v. State, 177 Wis. 394.....	13
West Allis Foundry Company v. State, 186 Wis. 24.....	13
Wisconsin E. R. Board v. Allis-Chalmers. W. Union, 252 Wis. 43.....	24, 27
Zillmer v. Kreutzberg, 114 Wis. 530.....	12

Statutes Cited

Wisconsin Statutes, Section 111.01 (1) - (4).....	20
Wisconsin Statutes, Section 111.04.....	21
Wisconsin Statutes, Section 111.06 (2) (h).....	2, 21
Wisconsin Statutes, Section 111.07 (7).....	17
Wisconsin Statutes, Section 103.43 (1a).....	14
Wisconsin Statutes, Section 103.53.....	12
Wisconsin Laws of 1939, Chapter 57.....	1, 19
Act of June 25, 1943, Public Law 89, 78th Congress..	11
Act of July 5, 1935, Chapter 372, 49 Stats., 499, U.S. Code, Title 29, Section 151-166; Section 1.....	7

Other Authorities

Restatement of the Law of Torts, Volume 4, Section 797.....	7
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

Nos. 580 and 581

**INTERNATIONAL UNION, U.A.W.A., A.F. of L., LOCAL 232;
ANTHONY DORIA, CLIFFORD MATCHEY, WALTER
BERGER, ERWIN FLEISCHER, JOHN M. CORBETT,
OLIVER DOSTALER, CLARENCE EHLMANN, HERBERT
JACOBSEN, LOUIS LASS,**

Petitioners,

vs.

**WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E.
GOODING, HENRY RULE and J. E. FITZGIBBON, as Members
of the Wisconsin Employment Relations Board; and BRIGGS &
STRATTON CORPORATION, a corporation,**

Respondents.

**Brief of
BRIGGS & STRATTON CORPORATION
IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

ARGUMENT

- I. THE DECISION BELOW RESTS PURELY
UPON A FINDING OF FACT, BASED ON
SUBSTANTIAL EVIDENCE, THAT THE
TACTICS ENGAGED IN WERE NOT
A STRIKE.**

A. The Wisconsin Statute Involved.

Chapter 57 of the Laws of Wisconsin of 1939 created
Chapter III of the Wisconsin Statutes, known as the

Wisconsin Employment Peace Act. The section of that Act primarily involved here is:

"Section 111.06(2) It shall be an unfair labor practice for an employe individually or in concert with others:

(h) To take unauthorized possession of property of the employer or *to engage in any concerted effort to interfere with production* except by leaving the premises in an orderly manner for the purpose of going on strike." (our emphasis)

The validity of this section is discussed subsequently.

The Wisconsin Employment Relations Board, the Administrative Tribunal created to administer the Act, found as a *fact*, that the tactics engaged in, constituted a concerted effort to interfere with production and that they did not constitute a strike (R 122-134).

B. The Evidence Completely Supports the Board's Finding of Fact.

1. The Facts Established That the Activities Engaged in Were Production Interferences Within the Exact Language of the Wisconsin Act.

The petition for the Writ of Certiorari and Petitioners' brief fail to bring fairly and sharply to the attention of this Court the actual facts involved and the significance thereof which thus distorts and beclouds the real issues.

Briggs & Stratton Corporation operates two manufacturing plants in Milwaukee, Wisconsin, employing about one thousand production employees at each plant. (R 154). The Union is the certified bargaining agency for the Company's hourly-paid employees (R 155).

The Union and the Company had a number of contracts commencing about 1938. In 1944 differences arose over the terms of a proposed new contract and proceedings were taken before the War Labor Board in 1944 and 1945, during which the parties continued intermittent bargaining negotiations (R 155-157).

On November 6, 1945, at about 1:30 p.m., approximately two hours before the end of the first shift, virtually all of the production employees at both plants, without previous notice or warning and at the instigation and direction of the Union, suddenly interrupted production and left the plants. The night shift did not report for work. All employees reported at the usual times the following day, took control of their places of work and went to work (R 155-159). The Company was given no explanation then as to why the employees had left (R 158). However, it was told in December, 1945, that the walkouts were "spontaneous", not the Union's action, and were caused by the employees. (R 160-161).

On November 16, 1945, the same procedure was followed, excepting that the night shift employees came to work. Thereafter and at closer intervals and at varying hours in the day the same procedure was followed on twenty-seven occasions between November 6, 1945 and March 22, 1946 (R 159-161; Exhibit No. 2, R 241).

Some weeks after the first walkouts the Company was told that the stoppages were being called so that employees could attend "Union meetings" (R 160). This was fictitious and the Union admitted at the hearing that "the intent of the work-stoppage is to interfere with production" (R 177).

The procedure caused crippling chaos in the plant, including severe curtailment of production; delays in shipments to customers; piling up of inventories; complete disruption of work schedules; tremendous increase in overhead; serious losses and an unusual turnover in employees (R 161-165).

Employees who refused to participate had their lockers, clothing, tools and other personal property damaged, stolen and concealed and were subjected to threats coercion and intimidation (R 157, 183-216).

About February 10, 1946 (R 175), the Union leader who claimed to be the author of this new labor tactic (R 177), gave a detailed interview to the Milwaukee press and publicly boasted that the new "weapon" was definitely *not a strike* (R 175-177; Exhibit No. 6, R 242-6).

At the outset of this interview he stated that the series of "meetings", "are actually a new type of labor weapon designed to replace the strike" (R 242). He said, "We analyzed the picture thoroughly before we arrived at this idea" (R 243). He emphatically proclaimed, "*If you called this a new form of strike you would be making a bad mistake. It's a labor weapon actually designed to avoid a strike and the hardships which a strike imposes on the workers. We think it's a better weapon than a strike*" (R 242).

To nail the matter down, he then went into detail to point out the features that distinguished this new tactic from a strike (R 243-244) and among other things said:

"The meetings are called without warning and take the Company by surprise. They find it difficult to make commitments or plan production. This can't be said for the strike. After the initial surprise of the walkout the Company knows just what to do and plans accordingly" (R 244).

Thus the new tactic was carefully devised for the express purpose of avoiding a strike and one of its most vicious purposes was to prevent an employer, no matter how unreasonable the Union's demands, from, (a) trying to carry on with such employees who want to work, or (b) hiring new employees, or (c) closing down the plant and making proper arrangements for its protection, as in the case of a strike.

Until the appearance of this public announcement, the Company had temporized with the situation and no one had been disciplined or discharged (R 159). If the employer had refused to permit the employees to return to work after such "Union meeting", the Union, whether correctly or not, would no doubt have asserted that the employer was guilty of an unfair lockout under the National Labor Relations Act.

However, after the newspaper article appeared, the Company filed a complaint with the Wisconsin Employment Relations Board charging the Petitioners herein with engaging in unfair labor practices under the section of the Wisconsin Employment Peace Act quoted above and also with violating other portions of that act.

At the trial the Union leader testified unequivocally:

"I would say definitely that the *intent* of the work stoppage is to interfere with production." (R 177.)

On virtually uncontroverted evidence, the Board found as *facts* that the Union and employees engaged in the twenty-seven work stoppages for the purpose of interfering with production; "publicly stated their intent and purpose to continue" such stoppages; threaten with punishment employees who failed to participate; had never conducted a strike vote required by the Wisconsin Act;

and "that *no strike has been called by the respondent Union nor the employees of the Briggs & Stratton Corporation against the Company at any time*" (R 124-126). (our emphasis)

The Board ordered the Union to cease and desist from "engaging in any concerted efforts to interfere with production by *arbitrarily* calling union meetings and inducing work stoppages during regularly scheduled working hours; or engaging in any other concerted effort to interfere with production of the Company *except by leaving the premises in an orderly manner for the purpose of going on strike*" (R 127). (our emphasis)

(This language of the foregoing portion of the order is incorrectly stated by Petitioners at page 5 of their petition).

The Board also ordered cessation of coercion and intimidation of employees and of acts of violence.

2. The Board Correctly Found on the Facts That the Activity Indulged in Was Not a Strike.

Petitioners, at pages 23-27 of their brief discuss what constitutes a strike, but divert attention from the fact that *that question is the first and most fundamental issue in the case.*

a. The Tactics Used Were Not a Strike Within the General Meaning of the Term.

Whether a given activity is a strike is a question of *fact*. The Petitioners formulate some elements of a strike at page 21 of their brief; indicating reliance on Webster's Dictionary. We do not find in the Webster edition cited the elements as set forth in Petitioners' brief. We do find

as the first element "an act of *quitting*", not merely "*stopping*" work. However, what the courts have said is more applicable here than a dictionary definition.

Section 1 of Chapter 372, 49 Stat. 499, U. S. Code, Title 29, Sec. 151-166 (Wagner Act 1935) provides:

"... refusal by employers to accept the procedure of collective bargaining lead ~~to~~ strikes and *other* forms of industrial strife. . . ." (our emphasis)

This recognizes the existence of other forms of economic warfare or labor weapons different from strikes.

In Section 2(3) of that Act, an "employee" is defined to "include any individual whose work has *ceased* as a consequence of, or in connection with, any current labor dispute . . ." (our emphasis). Thus employees who are on *strike* retain their status as employees and such a situation exists only when the employees have "*ceased*" (stopped, ended) their work and not when they are insisting on continuing to work with self-declared, intermittent, interruptions.

The case of *National Protective Association of Steam Fitters and Helpers v. Cummings*, 170 N. Y. 315, states a commonly accepted definition of a strike thus, "A strike is to *cease* working in a body by pre-arrangement *until a grievance is redressed*". (our emphasis)

The Restatement of the Law of Torts, Volume 4, Section 797, defines a strike as follows:

"A strike is a *continued* refusal by employees to do any work for their employer, or to work at their customary rate of speed *until the object of the strike is attained*; that is, *until the employer grants the concession demanded*." (our emphasis)

The same authority points out that it is not a *strike* if employees *temporarily* stop work, even though using the

stoppage as an attempt to exact a concession and gives the following illustration:

"A's employees, after consulting with each other, decide to have a picnic on a certain day. They request A's permission to be absent on the afternoon of that day. A refuses. The employees nevertheless cease work at noon and hold their picnic. *This stoppage is not a strike.*" (our emphasis)

There are many types of concerted activities by employees to bring pressure upon employers to yield concessions which have not been recognized to be strikes or to be legitimate, for example, the slow-down; a refusal to work scheduled hours as in *Mt. Clemens Pottery Co.*, 46 N.L.R.B. 714; a refusal to do assigned work as in *Niles Firebrick Co.*, 30 N.L.R.B. 426; ten to twenty minute stoppages of the production line in *Cudahy Packing Co.*, 29 N.L.R.B. 837; the refusal of waiters to serve meals at the scheduled time in *New York State L.R.B. v. Union Club of the City of New York*, 266 App. Div. (N.Y.) 516; the attempt to control shift time by coming in early as in *Harnischfeger Corp.*, 9 N.L.R.B. 676; the boycott; the refusal to work on material from strike-bound plants; the refusal to work on non-union goods and the sit-down so severely condemned by this court in *National Labor Relations Board v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 80 L. ed. 627.

Another union announced its own schedule of days on which certain employees would report. This was properly condemned by the court in *Home Beneficial Life Ins. Co.*, 159 Fed. 2d 280, (4th CCA). In that case the union representatives carefully avoided the use of the word "strike" for the concerted withholding of work on certain scheduled days. The Union did declare and stage a genuine strike

somewhat later. The court held *the original activity did not amount to a strike* and said:

"The statute (Sec. 7 (Wagner Act)), . . . does not and could not confer on them (the employees) the *right to engage en masse in unlawful activities*, or, to defy the authority of the employer to manage his business *while remaining in his service*. When they engage in an unlawful sit-down strike, as in (cites *Fansteel* case), they may be discharged by an employer, even though he has been guilty of unfair labor practices; and when, as here, *they refuse to obey the rules laid down by a law-abiding management for the conduct of the business*, they may be discharged and their places may be permanently filled." @ 284 (our emphasis and parenthetical insert)

A situation practically identical with the facts here is found in *C. G. Gonn Limited v. National Labor Relations Board*, (7th CCA) 108 Fed. 2d 390 (1939) where, when certain wage demands were not granted, the employees, without prior notice, stopped work in a body before the end of the scheduled work period, but returned to work at the regular time the next day indicating that they intended to continue the practice. The employees were disciplined and they brought charges of unfair labor practices before the National Labor Relations Board asserting that the procedure was a "strike" for which the employer could not impose discipline.

Because the factual situation is so close to that here and the court's analysis so ably points out the impropriety of the conduct on general principles we quote at some length for the convenience of the court:

"We are supplied with numerous definitions of the word 'strike'. They are all substantially alike and we quote from American and English Encyclopedia of Law, Volume 34, page 123, as follows: 'The term

"strike" is applied commonly to a combined effort on the part of a body of workmen employed by the same master to enforce a demand for higher wages, shorter hours, or some other concession, by stopping work in a body at a pre-arranged time, and REFUSING TO RESUME WORK UNTIL THE DEMANDED CONCESSION SHALL HAVE BEEN GRANTED.' " @ 396

"We are of the opinion that *the facts in the instant situation do not bring the discharged employees within this or any other definition of the word 'strike' of which we are aware. We are unable to accept respondent's argument to the effect that an employee can be on a strike and at work simultaneously. We think he must be on the job subject to the authority and control of the employer, or off the job as a striker, in support of some grievance.*" @ 397

* * * * *

"(8) Even, if it be assumed that there was a labor dispute, within the meaning of 2(9) *the fallacy of this argument to us lies in the fact that the employees did not cease work in consequence of such dispute. Undoubtedly, when petitioner refused to comply with their request, there were two courses open. First, they could continue work, and negotiate further with the petitioner, or, second, they could strike in protest. They did neither, or perhaps it would be more accurate to say they attempted to do both at the same time. We have observed numerous variations of the recognized legitimate strike, such as the 'sit-down' and 'slow-down' strikes. It seems this might be properly designated as a strike on the installment plan.*

"*We are aware of no law or logic that gives the employer the right to work upon terms prescribed solely by him. That is plainly what was sought to be done in this instance. It is not a situation in which employees ceased work in protest against conditions imposed by the employer, but one in which the employees sought and intended to continue work upon their own notion of the terms which should prevail.*

If they had a right to fix the hours of their employment, it would follow that a similar right existed by which they could prescribe all conditions and regulations affecting their employment." @ 397 (our emphasis)

In the case of *Sandoval v. Industrial Commission*, (1942) 110 Colo. 108, 130 Pac. 2d 930, the court said:

"A strike possesses at least four ingredients other than the suspended employer-employee relationship which has been mentioned, namely: (1) A demand for some concession, generally for a modification of conditions of labor or rates of pay; (2) a refusal to work, with intent to bring about compliance with the demand; (3) an *intention* to return to work *when compliance is accomplished*; . . ." (our emphasis)

The Act of June 25, 1943, Public Law 89, 78th Congress (Smith-Connally Act) was for the purpose of trying to reduce strikes. Section 8-A provided that;—

"(1) The representative of the employees of a war contractor, shall give to the Secretary of Labor, the National War Labor Board, and the National Labor Relations Board, notice of any such labor dispute involving such contractor and employees, together with a statement of the issues giving rise thereto.

* * * *

"(3) On the thirtieth day after notice under paragraph (1) is given by the representative of the employees, unless such dispute has been settled, the National Labor Relations Board shall forthwith take a secret ballot of the employees in the plant, plants, mine, mines, facility, facilities, bargaining unit or bargaining units, as the case may be, with respect to which the dispute is applicable on the question whether they will permit any such interruption of war production."

It is highly significant that *no notice or vote to comply with that Act was ever taken in this case* and shows that

the employees here and their Union never deemed their procedure to be a strike.

The Wisconsin law contains a somewhat similar requirement for a strike vote and the Union's failure to comply with that requirement also proves the same thing.

Obviously Congress never intended that a series of short intermittent walkouts would be deemed strikes since if they were, then before each of the walkouts, the employees would have to give a thirty day notice and the Board would have had to conduct a strike vote,—in this case, twenty-seven between November, 1945 and March, 1946. No such ridiculous situation was contemplated by Congress and the obvious conclusion is that such tactics were never deemed by Congress to rise to the dignity of a strike.

b. The Wisconsin Law as to What Constitutes a Strike is in Accord with the General Rule.

The right to strike is expressly protected, not only through declarations of the Wisconsin court, and in Section 111.06(2) (h) quoted above, but also in Section 103.53 Wisconsin Statutes reading as follows:

“(1) The following acts, whether performed singly or in concert, shall be legal:

(a) Ceasing or refusing to perform any work . . .”.

The earliest Wisconsin case dealing with the meaning of the word strike is *State ex rel Zillmer v. Kreutzberg*, 114 Wis. 530 (1902) where the court said:

“ . . . included in the meaning of the word ‘strike’ was the mere concurrence of a number of individuals, in the exercise of their inherent right, to *quit* their employment, . . . ” (our emphasis) @ 536

In the case before the court, the employees vigorously claim they did not in any sense "quit", but on the contrary assert they held on to their jobs which they could work at hours fixed by themselves.

In *Walter W. Oeflein, Inc. v. State*, 177 Wis. 394 (1922), the question was whether a strike was in existence when an employer advertised for labor. If it was, the employer had violated (present) Section 103.43 Wisconsin Statutes which prohibits advertising for labor without indicating that a strike is in existence, if such is the fact. The court said:

"Webster's New International Dictionary, on page 2058, defines the word 'strike' as follows: 'An act of *quitting* when done by mutual understanding by a body of workmen as a means of enforcing compliance with demands made on their employer,'

* * *

"The number of men necessary to constitute a strike in refusing to continue work, pursuant to united effort, depends in each case upon the peculiar facts in the case, and no definite rule can be laid down. The legislature did not see fit to define the term 'strike,' but on the contrary used the term in the sense that it is ordinarily used in connection with labor troubles and as defined by standard authorities upon the subject." @ 399 (our emphasis)

In 1925 the Wisconsin Supreme Court was again confronted with a prosecution under the same statute and said:

"There can be no question but that when by concerted action, a number of the company's employees quit work on October 22nd because of the proposed cut in wages, they then entered upon a lawful strike as such term is understood and declared." *West Allis Foundry Company v. State*, 186 Wis. 24, @ 28 (our emphasis)

Justice Charles H. Crownhart, well known friend of labor, wrote a dissenting opinion to the effect that, on the

facts, the strike still existed. A portion of his remarks have important bearing on the subsequent Wisconsin law:

"The real test of a strike must be: Are the usual concomitants of a strike still attached to the situation; are the men still out; are pickets kept up; are the union and union papers still publishing notices of the strike; is pressure still maintained on the employer by which he is burdened financially, or physically and mentally impressed; are men prevented from accepting employment at the plant by reason of the conditions existing with reference thereto; are strike benefits still being paid; is the action of the employees, or the union in their behalf, to maintain the strike, in good faith with some hope of ultimate success? If any or all of these questions may be answered in the affirmative, there is some evidence of a strike actually existing, and if most of them exist, as they did in this case, then the fact of a strike actually existing is sufficiently established, as the term 'strike' is used in the act before us." (our emphasis) @ 39

This decision was rendered in February, 1925 and in June, 1925, the Legislature enacted Wisconsin Statute, Section 103.43 (1a) and thereby incorporated into the Wisconsin statutory law this definition of a strike:

"A strike or lockout shall be deemed to exist as long as the usual concomitants of a strike or lockout exist; or the unemployment on the part of the workers affected continues; or any payments of strike benefits is being made; or any picketing is maintained; or publication is being made of the existence of such strike or lockout." (our emphasis)

This definition accords with the general understanding and confirms the proposition that *whether or not an activity in a given case is a strike is a question of fact on the evidence submitted in the particular case.*

Applying that statute here, virtually none of the prescribed concomitants of a strike (i.e. factual elements) were present. The employees were never "still out"; there was never any picketing; the union and the union papers, instead of publishing the existence of a strike, were publicly declaring that their procedure did not constitute a strike; no one was being prevented from accepting employment at the plant and no strike benefits were being paid.

The Petitioners argue that the duration of the withdrawals is not the test of whether an activity constitutes a strike. We agree. We emphatically insist, however that the authorities discussed establish that the question of the *intent* is one of the fundamental *facts* which determines whether a work stoppage is or is not a strike.

**c. The Board's Finding of Fact, Supported
by Substantial Evidence, is Made Conclu-
sive by the Statute and Will Not be
Disturbed on Appeal.**

The public declaration of the persons who devised this technique that the stoppages were not strikes, is the clearest evidence of what the intent was;—namely *not to strike*.

Several varying and contradictory statements of the intent of the employees were given.

(1) The stoppages were first said to be "spontaneous" and without assigned purpose.

(2) The intent was next stated to be merely to attend "union meetings"; the causing of injury to the employer was merely an incident.

(3) The next intent testified to was to interfere with production and inflict economic loss and injury on the

employer and eliminate the possibility of the employer protecting himself.

(4) Finally the last intent, *advanced for the first time after the hearing before the Board*, was that the intent was to "strike".

Not only is it true that *intention* is one of the vital elements in determining whether a given activity constitutes a strike, but it is also clear that whether a given intention did or did not exist *is the question of fact*.

"An intent already formed is a fact just as much as any other physical fact." *Baker v. W.U.T. Co.*, 134 Wis. 147; *Bowe v. Gage*, 127 Wis. 245; *Sharpe v. Hasey*, 141 Wis. 79; *Retail Clerks' Union v. Wisconsin Employment Relations Board*, 242 Wis. 21.

The Wisconsin Board had before it the Union's repeated assertions that the walkouts were not *intended* as strikes and did not constitute strikes and were with the intent of preserving to employees, rights which could not be preserved if the stoppages actually were strikes, and that the *intent* was to impose upon the employer a prolonged series of intermittent stoppages of production which would come without advance notice, could not be planned for, and which would exert a crippling effect on all efforts for planned operation of the business.

Bearing on this intent, the Board also had before it the fact that there had been no advance secret ballot for a strike as required by the Wisconsin Act or by the Smith-Connally Act which was evidence of no small significance on the issue of whether a strike was intended. Furthermore, there was before the Board the earlier conflicting assertions of the Union that the purpose of the stoppages were in no wise intended to interfere with production, but merely to allow the employees to attend bona fide

Union meetings, which assertions were later repudiated by the Union.

On the other hand there was before the Board virtually nothing except the *arguments* of the Union's counsel that the stoppages did constitute strikes. That latter assertion would hardly be legally sufficient as *evidence* to raise an issue of fact as to the intent animating the work stoppages. While it is doubtful that the record before the court disclosed any evidence which could be considered substantial enough to support a finding that the intent was to strike, even if we assume, for the purpose of argument, that the record reflects *some* evidence that the intent was to strike, *the Board found to the contrary.*

The Wisconsin Act includes a provision, consonant with the general law, which defines the effect to be given a finding of the Board as follows:

"The findings of fact made by the Board, if supported by credible and competent evidence in the record, shall be conclusive." Sec. 111.07(7) *Wis. Stats.* 1945.

Since the vital, factual elements upon which the question of "strike" or "no-strike" rests, were found by the Board upon evidence greatly prepondering in favor of the Board's finding, the fact that the stoppages were not strikes has been completely set at rest against the Petitioners. Those findings as pointed out, were sustained by virtually undisputed evidence and are, as the Statute declares, now "conclusive", — conclusive not only upon the Supreme Court of Wisconsin, but likewise upon this Court.

The same principle arises under the National Labor Relations Act and has been repeatedly applied by this Court.

In the face of the substantial, credible and competent evidence which amply supports the Board's finding on controverted factual elements, for this Court to undertake to re-determine those elements, or in any respect to examine into them beyond the point of verifying the existence of substantial evidence supporting the Board's findings, would be contrary to the settled principles of judicial review of administrative findings. All this the Petitioners' brief ignores.

The granting of certiorari could result in no more, upon the strike issue, than to have this Court verify what is now readily verified on the record, namely, that the Wisconsin Board's fact finding that these stoppages were not strikes is supported by ample evidence and thus beyond judicial re-examination.

II. THE WISCONSIN STATUTE INVOLVED AND THE ORDER IN CONFORMITY THEREWITH INFRINGE NO CONSTITUTIONAL OR FEDERAL RIGHTS OF PETITIONERS.

A. The History and Terms of the Act Show the Purpose is to Protect Completely All Rights of Wisconsin Citizens.

Petitioners' brief contains much inflammatory and reckless exaggeration, including the following:

"The order would in effect chain the employees to their machines, seal their lips and cut off communication with others, even during their off hours." @ 30.

"... such protection from involuntary servitude becomes a mere sham ..." @ 34

"For the exercise of this kind of freedom as prescribed by the State of Wisconsin, can never lead to

the improvement or enlightenment of the working man's status, but only to his degradation and *further* (?) economic enslavement." @ 34-35 (our emphasis and question mark)

"The judgment . . . compels working people to labor against their will for the sole benefit of their employer, the Briggs & Stratton Corporation." @ 36

" . . . will enforce such order by fine or imprisonment if the chains are cut or the lips unsealed." @ 31

That Petitioners are compelled to fall back on such extravagant imagery, demonstrates the weakness of their position, draws in question the accuracy of other assertions and calls for dispassionate examination of the history and true effect of the Wisconsin law thus so violently attacked.

Wisconsin yields to no state in the advancement of social reform and legislation for the improvement of the status of working people (first workmen's compensation act, first legislation for protection of women and children employees, etc.). Its early protection of the right to strike has been noted.

In the late thirties, the nation had experienced the rise of the industrial unions, the intensive union organizing campaigns, and jurisdictional disputes, the bitter strikes in the steel and automobile industries, the spectacle of the *Fansteel* sit-down strike and the riots in connection therewith. *National Labor Relations Board v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 80 L. ed. 627, decided February 27, 1939.

The Wisconsin Legislature in enacting Chapter 57 of the laws of 1939 (Wisconsin Employment Peace Act) approached the labor problem from a somewhat different viewpoint than the Wagner Act and concluded that labor relations were "a two-way street". It recognized that the *public* has a major interest and that *both* employer and

employee have mutual duties, responsibilities and rights to be protected and that certain activities of *both* employees and employers should be discouraged.

Parts of the "Declaration of Policy" bear directly on the purpose and effect of the section of the Act here challenged.

"Section 111.01. The public policy of the state . . . is declared to be as follows:

"(1) . . . there are three major interests involved namely: that of the public, the employee and the employer . . . It is the policy of the state to protect and promote each of these interests with due regard to the situation and to the rights of others.

"(2) Industrial peace, regular and adequate income for the employee, and uninterrupted production of goods and services are promotive of all of these interests.

"It is also recognized that whatever may be the rights of disputants with respect to each other in any controversy regarding employment relations, they should not be permitted, in the conduct of their controversy, to intrude directly into the primary rights of third parties to earn a livelihood, transact business and engage in the ordinary affairs of life by lawful means and free from molestation, interference, restraint or coercion.

"(3) Negotiation of terms and conditions of work should result from voluntary agreement between employer and employee. For the purpose of such negotiation an employee has the right, if he desires, to associate with others in organizing and bargaining collectively through representatives of his own choosing, without intimidation or coercion from any source.

"(4) It is the policy of the state, in order to preserve and promote the interests of the public, the em-

ploye, and the employer alike, to establish standards of fair conduct in employment relations and to provide a convenient, expeditious and impartial tribunal by which these interests may have their respective rights and obligations adjudicated.

"While limiting individual and group rights of aggression and defense, the state substitutes processes of justice for the more primitive methods of trial by combat."

The Act expressly provides that:

"Section 111.04 Employees shall have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection; and such employees shall also have the right to refrain from any or all of such activities."

The legislation provided that while employees should retain their right to strike, under proper circumstances for legitimate purposes and in an orderly manner, it would be an unfair labor practice for employees, individually or in concert with others, "to take unauthorized possession of the property of the employer or to engage in any other concerted effort to interfere with production" except by a strike, (Section 111.06(2)(h)).

The word "strike" was used in that section in harmony with the terms of Section 103.43 (1) discussed above. The word couldn't have been used as covering the activity here involved *since that tactic had not been devised in 1939 according to the Petitioners' own claims.*

While the legislature could not foresee all of the new "weapons" which might be devised, it plainly anticipated that there might be variations of the sit-down, slow-down

or other objectionable concerted efforts and hence it adopted the general phrase "concerted interferences with production" and banned them, while excepting from such phrase the well understood "strike".

Wisconsin preserved to the employees the right to endeavor to enforce employers to accede to demands by concertedly refusing to continue work until the controversy has been resolved, but for the preservation of the best interests of all its citizens it said employees shall not engage in sit-downs, secondary boycotts, slow-downs nor other concerted efforts to interfere with production. It said to employees, if you are going to be an employee, then perform for your employer the work which in good faith and by contractual implication you have agreed to perform at the times, places and manner set by the employer; if you are not satisfied with the conditions you are perfectly free to leave the premises whenever you wish to try to enforce your demands, but if you do so, stay off the premises until the dispute is settled.

If the employer thinks that he can operate with those employees who are willing to abide by the employment conditions, he is free to try it or he may close down his plant until the controversy is settled but he shall not be compelled to keep it open for the employees to work at their own whim.

Wisconsin placed a reasonable limit on the chaos and confusion which it will permit employees to cause in a given plant.

The argument that since the employer may not suffer as much from the tactics used here as he would by a genuine strike, therefore, the tactic should not be banned, is not tenable. The same might be said for the sit-down or the slow-down which by their very nature could not last over

the period of months involved here, but which have, nevertheless, been condemned by the courts. Those are labor tactics which are now admittedly improper and unlawful though having most of the elements which Petitioners say go to make up a strike.

The argument is like saying that a warring nation should not complain of the use of poison gas, since its opponent might have used a worse weapon.

The point is not whether a court might think that this particular activity is less "harmful". What governs is whether this legislation, which seeks by reasonable means, to reduce or limit the type of weapons to be used in economic warfare, actually deprives any person of any *specific* right which the Constitution says he shall have. Unless it clearly appears that the Constitution forbids this type of law, the court will not substitute its judgment for that of the Legislature as to what is the best way to promote industrial peace.

Because the "rules" of economic warfare permit strikes, is no basis for denying the right of a state to ban other objectionable practices calculated to injure others even though one may think such practices are "less harmful" than a strike.

This provision of the Wisconsin law is actually for the benefit and protection of the employee. Under the Federal legislation, as noted, a "striking" worker still retains his status as an employee and may not be disciplined for engaging in a lawful strike. However, for tactics such as these, — it is clear (and Petitioners' brief so concedes by implication at page 27) that the employer could discipline or discharge the employees involved.

The Wisconsin Supreme Court has very recently said:
 "The right to strike is a valuable right which not only the congress and legislature of the various states

but the courts, federal and state, have sought to guard and protect, but the right to strike does not include the right to commit assaults, destroy property, *deprive other people of the right to earn their living in the place where they are employed.*" *Wisconsin Employment Relations Board v. Allis-Chalmers Workers Union*, 252 Wis. 43, Dec. 23, 1947 (our emphasis)

Thus the Wisconsin Court which very vigorously protects a legitimate strike activity, in the case before the court recognized that one vice of the tactic here used, (which it held was not a strike) was its menace to the rights of working men themselves since it sought to destroy the right of *anyone* to work the jobs in the manner legitimately scheduled by management.

The Union leader testified he had had requests from 350 unions to see how the new tactic works (R 179), implying that if the procedure "stood up" the tactic would be widely used.

This disruption of production and deliberate confusion of operations is an unjustifiable interference with management which if it should become widespread can well mean the end of jobs.

The Union's brief glosses over the grave *practical* business considerations involved which are of vital interest to the welfare of employees, employers and the public alike. *If this device were actually given legal sanction it could mean the complete usurpation of management by the Unions.*

Certainly no court can say that this legislative enactment is so unreasonable as to be unconstitutional, and that it will not accomplish its purpose of protection of the fundamental rights of *both* employers and employees.

The Union bases its brief on the fundamentally fallacious assumption that *any* concerted activities of a group of working men which they feel will be of benefit to them are guaranteed to them by the Constitution and that the Constitution and Federal law give them the *right* to try to enforce *any* demand by *any* type of "economic pressure" they can devise. Such is not the case. Even strikes, if conducted in an illegal manner (mass picketing and violence), or if engaged in to coerce an employer to perform an illegal act, and many other concerted activities which do not amount to strikes as above noted, are beyond the pale of the federal law or the protection of the Constitution.

B. Nothing in the Constitution or Federal Law Prohibits the Reasonable Regulation Imposed.

The SECOND REAL ISSUE then in this case is whether there is anything in the United States Constitution or the Federal law which provides that a state may not adopt a reasonable regulation for the welfare of its citizens of the type involved.

The brief in support of the Petition contains many generalities, but we find in none of the authorities cited, support for the brief's conclusions as to this statute. The employees are all free to stop work and go out on strike whenever they see fit and to stay out as long as they choose. They do not have to work for this employer one minute. They have, however, been told that if they do not wish to engage in a legitimate strike and if they do want to insist on working for the employer, so long as they do so work, they shall stop interfering with production by the fictitious ruse of *arbitrarily* calling "meetings" during the regularly scheduled working hours. No Constitutional provision nor any Federal law can be construed

in so warped a fashion as to prohibit such regulation. It does not interfere with the free flow of goods in commerce, — it increases the likelihood of production. It makes slaves of none, but enhances the security of work and jobs.

None of the cases cited support the claim that the regulation in any sense interferes with the power of Congress over commerce (Const., Art. I, Sec. 8).

We find nothing in the brief even tending to indicate any prohibition in Article IV of the Constitution against regulation of the type here involved.

The argument with respect to the Thirteenth Amendment to the Constitution relating to involuntary servitude is nonsense. Petitioners have unduly frightened themselves over an imaginary spectre that just simply doesn't exist in the Act.

With respect to any alleged conflict between the statute and the Fourteenth Amendment to the Constitution, the Union fails to demonstrate that a single employee is deprived in any manner whatever of his lawful rights or his liberty or his property either with or without due process of law nor is any person within the jurisdiction of the State of Wisconsin denied the equal protection of the law as that term has been repeatedly interpreted in the cases.

The Union had devised a means of causing chaos in the production of goods which threatens to become widespread; the scheme calls for employees holding their jobs so that no other person can perform necessary work and at the same time permits the employees to refuse to perform their work at the time and in the manner in which their contract of employment requires. Wisconsin says that they may not do this; — they may quit their employ-

ment, they may engage in a strike, but if they intend to do neither, they shall not employ the underhanded disruptive procedure in question.

The tactics are not only as inherently untenable and improper as the sit-down but they were indeed another form of holding the employer's property against his will, and extending as they did over many months are even more disruptive, chaotic and promotive of damages than even the repudiated sit-down.

The Constitution either says directly or by implication that such tactics are immune from state regulation or it does not say that. Examination of the Constitution and the National Labor Relations Act discloses that on their face such activities are not so immune. *It follows that the regulation is permissible.*

The scrupulous jealousy with which Wisconsin guards employee's constitutional rights and at the same time demands respect for the law, can hardly be better expressed than in the following recent declaration of the Wisconsin Supreme Court:

"In the administration of the law the courts of other states as well as this court protect the rights of workingmen as they are declared by the law, but in doing so it is not a part of their duty to ignore or palliate violations of law by workingmen who were treated exactly on the same basis and governed by the same law that governs other citizens of Wisconsin. While workingmen enjoy certain rights and immunities not enjoyed by other citizens the conferring of these privileges give them no license to violate the law of the land." *Wisconsin E. R. Board v. Allis-Chalmers W. Union*, 252 Wis. 43, @ 51 (1947).

Because it is anticipated that the Attorney General of Wisconsin will include in his brief, reference to the con-

stitutional authorities, this brief has purposely eliminated discussion of such authorities to avoid duplication.

III. CONCLUSION

The Petition for Writ of Certiorari should be denied because:

(1) The decision of the Wisconsin Supreme Court sought to be reviewed is primarily and simply a correct holding that there was substantial evidence to support the findings of fact of the administrative tribunal to the effect that the Petitioners' activities did not amount to a strike.

Hence no principles of general application or concern are involved.

(2) The Petitioners fail to demonstrate that they have been deprived of any of the Constitution or Federal rights or privileges.

Respectfully submitted,

EDGAR L. WOOD,

RICHARD H. TYRRELL,

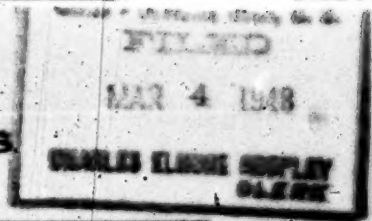
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Of Counsel.

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In The
Supreme Court of the United States

October Term, 1948

No. ~~580~~ ~~581~~ 147

INTERNATIONAL UNION, U. A. W. A., A. F. of L.,
LOCAL 232; ANTHONY DORIA, CLIFFORD
MATCHEY, WALTER BERGER, ERWIN
FLEISCHER, JOHN M. CORBETT, OLIVER DOS-
TALER, CLARENCE EHLMANN, HERBERT
JACOBSEN, LOUIS LASS, PETITIONERS,

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD,
L. E. GOODING, HENRY RULE AND J. E.
FITZGIBBON, AS MEMBERS OF THE WISCON-
SIN EMPLOYMENT RELATIONS BOARD; AND
BRIGGS & STRATTON CORPORATION, A COR-
PORATION.

On Petition for Writ of Certiorari to the
Wisconsin Supreme Court

BRIEF FOR RESPONDENT,
WISCONSIN EMPLOYMENT RELATIONS BOARD,
IN OPPOSITION

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Employment Relations Board.

i

INDEX AND SYNOPSIS OF ARGUMENT

	Page
QUESTION INVOLVED	1
FACTS	3
ARGUMENT	9
I. THE PROHIBITION INVOLVED DOES NOT INFRINGE UPON THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION	9
A. The Prohibition does not Deprive the Petitioners of Rights Secured by the National Labor Relations Act	10
B. The Prohibition Involved in this Case does not Violate Section 13 of the National Labor Relations Act	15
C. The Scope of the Prohibition does not Conflict with any Rights Conferred by the Federal Law	17
II. THE STATE HAS MADE NO ATTEMPT TO COMPEL EMPLOYEES IN A LABOR DISPUTE TO PERFORM WORK NOR TO PREVENT THEM FROM PEACEFUL ASSEMBLY	17
A. The Order Does not Violate the Thirteenth Amendment	19
B. The Order does not Violate the Fourteenth Amendment	23
III. THE SUBSTANCE AND PURPOSE OF THE ORDER UNDER REVIEW ARE BENEFICENT	24
CONCLUSION	26

CASES CITED

	Page
Allen-Bradley Local 1111 v. Wisconsin E. R. Board, (1941) 315 U. S. 740, 62 S. Ct. 820, 86 L. ed. 1154	10
Conn. C. G., Limited v. National Labor Relations Board, (1939) 108 F. 2d 390	10
Dorchy v. Kansas, (1926) 272 U. S. 306, 71 L. ed. 248, 47 S. Ct. 86	19, 20
Hotel & R. E. I. Alliance v. Wis. E. R. Board, (1942) 315 U. S. 437, 86 L. ed. 946, 62 S. Ct. 706	3, 10, 23
Howat v. Kansas, (1922) 258 U. S. 181, 66 L. ed. 550, 42 S. Ct. 277	21
National Labor Relations Board v. Draper Corp., (C. C. A. 4th, 1944) 145 F. 2d 199	10
National Labor Relations Board v. Fansteel M. Corp., (1939) 306 U. S. 240, 83 L. ed. 627, 59 S. Ct. 490	10
National Labor Relations Bd. v. Sands Mfg. Co., (1939) 306 U. S. 332, 83 L. ed. 682, 59 S. Ct. 508	10
People v. The United Mine Workers of America, District 15, et al, (1921) 207 Pac. 54, 70 Colo. 269	21
State ex rel. Hopkins v. Howat, (1921) 109 Kan. 376, 25 A. L. R. 1210, 198 Pac. 686	21
Western Union Tel. Co. v. International B. of E. Workers, Local Union No. 134, et al, (District Court, N. D. Illinois, 1924) 2 F. 2d 993	21

TEXTS

63 C. J. 565, sec. 17	Page 20
4 Restatement of the Law of Torts	
sec. 794	14
sec. 796	14
sec. 796	20
Topic 2, p. 117	14

ACTS

Labor Management Relations Act, House Report 510, 80th Congress, p. 60	12-13
Sec. 8, (d) (3)	16
Wagner Act, sec. 13	15

**In The
Supreme Court of the United States**

October Term, 1947

No. 4

**INTERNATIONAL UNION, U. A. W. A., A. F. of L.,
LOCAL 232; ANTHONY DORIA, CLIFFORD
MATCHEY, WALTER BERGER, ERWIN
FLEISCHER, JOHN M. CORBETT, OLIVER DOS-
TALER, CLARENCE EHRLMANN, HERBERT
JACOBSEN, LOUIS LASS, PETITIONERS,**

v.

**WISCONSIN EMPLOYMENT RELATIONS BOARD,
L. E. GOODING, HENRY RULE AND J. E.
FITZGIBBON, AS MEMBERS OF THE WISCON-
SIN EMPLOYMENT RELATIONS BOARD; AND
BRIGGS & STRATTON CORPORATION, A COR-
PORATION.**

**On Petition for Writ of Certiorari to the
Wisconsin Supreme Court**

**BRIEF FOR RESPONDENT,
WISCONSIN EMPLOYMENT RELATIONS BOARD,
IN OPPOSITION**

QUESTION INVOLVED (Respondents' summary
in correction of, and in addition to, the Petitioners'
statements at pages 2 to 6 and page 10 of their
petition for writ of certiorari)

The order of the state board for which review is sought
has two cease and desist provisions. Apparently the peti-
tioners challenge only the one set out in their petition

for certiorari. In order to support their challenge, however, they have quoted language of the Wisconsin court which applies *only* to the unchallenged provision. Furthermore, the challenged provision is misquoted, at page 5 of the petition for certiorari. In order to aid in clarifying the confusion, we are here setting out verbatim the challenged and unchallenged provisions of the state board's cease and desist order (R. 127-128).

"IT IS ORDERED that the respondent union, International Union, U. A. W. A.-A. F. L. and [its officers designated by name] shall:

"1. ~~Immediately~~ and at all times hereafter while this order is in effect, cease and desist from:

(a) Engaging in any concerted efforts to interfere with production by* arbitrarily calling union meetings and inducing work stoppages during regularly scheduled working hours; or engaging in any other concerted effort to interfere with production of the complainant except by leaving the premises in an orderly manner for the purpose of going on strike.

(b) Coercing or intimidating employees by threats of violence or other punishment to engage in any activities for the purpose of interfering with production or that will interfere with the legal rights of the employees."

It is not a correct statement of the issue to say that the case involves the right of a labor union and its members to withhold services by leaving premises or refusing to enter upon premises for short periods of time at irregular

*At page 5 of the petition for writ the word "and" appears erroneously in lieu of the word "by."

intervals; but rather it involves the question what conditions may be imposed upon such withholding of services. The petitioners, in framing their issue, have not set out accurately the restraints imposed, but have given a distorted interpretation of the prohibition in their endeavor to invoke constitutional issues.

This court said in *Hotel & R. E. I. Alliance v. Wis. E. R. Board*, (1942) 315 U. S. 437, 440-441, 86 L. ed. 946, 62 S. Ct. 706:

"* * * Whether Wisconsin has denied the petitioners any rights under the federal Constitution is our ultimate responsibility. But precisely what restraints Wisconsin has imposed upon the petitioners is for the Wisconsin Supreme Court to determine. In its opinion in this case, and more particularly in its explanatory opinion denying a rehearing, the Court construed the relevant provisions of the Employment Peace Act and confined the scope of the challenged order to the limits of the construction which it gave them. That Court has of course the final say concerning the meaning of a Wisconsin law and the scope of administrative orders made under it. *Aikens v. Wisconsin*, 195 U. S. 194; *Senn v. Tile Layers Union*, 301 U. S. 468. What is before us, therefore, is not the order as an isolated, self-contained writing but the order with the gloss of the Supreme Court of Wisconsin upon it. * * *

The prohibition challenged by the petitioners, as construed by the state court, does not ban the various activities enumerated on page 15 of the petition for writ. It does not prohibit engaging in peaceful work stoppages, nor does it prohibit attending union meetings. It prohibits only concerted efforts to engage in a combination of these activities under certain specific and definite circumstances. The

Supreme Court of Wisconsin said of the challenged provision:

"The order of the Board is criticized because it purports to ban employees from quitting work for the purpose of going to work elsewhere, or with intention of not resuming employment with the instant employer for whatever reason. The order has no such far-reaching effect * * *. What (a) does, and *all that it does* is to ban the individual defendants and the members of the union from *'engaging in concerted effort'* to interfere with production by doing the acts instantly involved." (R. 289) (Emphasis supplied)

The provision objected to expressly provides that it does not prohibit leaving the premises in an orderly manner for the purpose of going on strike. The petitioners allege that the Wisconsin court is in error on its classification of what constitutes a strike. We do not deem the Wisconsin court in error in that respect but, even if it were, that would not raise a federal question. There is no constitutional right to have certain activities called by a particular name. The only purpose for which the Wisconsin court's definition of what constitutes a strike is of any concern in this case is to determine the *substance* of the prohibition as interpreted by the Wisconsin court. The nomenclature used by the Wisconsin court is immaterial so long as the prohibited activities are defined.

The only federal question possible in the case is whether the prohibited activities, by whatever name they may be called, are ones which the federal constitution says may never be curtailed or conditioned.

If the petitioners prefer to designate the activities which were curtailed in this case as a strike, or as 27 sep-

arate strikes, even using that nomenclature the gist of the limitation upon the activities is constitutional, although we believe the Wisconsin court was entirely correct in stating that the activities were not strikes.

The Wisconsin court has said that all that is prohibited is what was done. As well as the limitation can be generalized without describing the activities in detail its gist is, regardless of nomenclature:

The petitioners may not in concert take over unilateral control of working hours, without notice, without avowal of objective and without relinquishment of control over the employment.

FACTS

A contract between the employer and International Union, U. A. W. A., A. F. of L., Local 232 (hereinafter called Local 232) expired July 1, 1944 (R. 241). After that time the employer and Local 232 negotiated for a new contract. They agreed on some points, but at the time of the events here involved had been unable to get together on an entire contract (R. 155, 157).

Among the matters upon which agreement had not been reached were the questions of maintenance-of-membership and check-off (R. 157, 165-166, 179). The record indicates that no referendum had been conducted, prior to the incidents here described, to legalize a maintenance-of-membership contract as required under sec. 111.06 (1) (c) of the Wisconsin statutes (R. 165-166); and the record does not show that conditions necessary to legalize the check-off under sec. 111.06 (1) (i) had been complied with.

The impression sought to be created by the petitioners at pages 2 to 3 of their petition for writ, to the effect that activities involved were for the purpose of enforcing a directive of the War Labor Board, is wholly unwarranted and misleading. No directive of the War Labor Board was served upon the employer until January 17, 1946 (R. 156) whereas the activities in this case commenced early in November 1945. The War Labor Board was abolished on January 1, 1946 by Presidential Order (Order #9672, 11 Fed. Reg. 221) at which time the emergency calling for application of a War Labor Board directive in lieu of other provisions of law was presumably ended. There was, therefore, no time during the activities involved in this case when a War Labor Board directive was in effect.

At a meeting of Local 232 held November 3, 1945, there was presented to the membership the question "what means of pressure is to be used on the company for a settlement" (R. 247). Anthony Doria, who is one of the officers of the international union with which Local 232 is affiliated, and who is also one of the trustees of Local 232, presented to the meeting what he deemed to be a new method of exerting economic pressure upon the employer, which "would avoid the hardship of strike" and which he recommended, "to stave off" a strike (R. 177-178). Such new method involved short, frequently repeated work stoppages, ostensibly to attend special union meetings called by the executive committee, without advance warning to, or any specific demand upon, the employer (R. 158-159, 180, 242-246). In authorizing the procedure the term strike was not used, but a motion was adopted only "to empower the executive board to call a special meeting during working hours at any time they see fit" (R. 247).

7

The minutes of the meeting at which the procedure was authorized contain the following descriptive information about it:

"* * * The most effective part in a stoppage of work is when you can leave work within a few minutes and the company will not be able to get out their schedules. *The old fashioned system of closing up the plant and go on a strike is past practice*, so let's use our heads and work on a sensible and workable program. If through our leaving work, the company decides to lock us out, then the employees can demand unemployment compensation" (R. 247). (Emphasis supplied.)

This device was regarded by union officers as a new and untried one (R. 236).

The purposes of the procedure and the features distinguishing it from a strike were described by a union officer in the following words:

"If you called this a new form of strike you would be making a bad mistake. It's a labor weapon actually designed to avoid a strike and the hardships which a strike imposes on the workers. We think it's a better weapon than a strike" (R. 242).

"Under the new method, meetings are called for any one or more of three possible reasons * * * any development in direct negotiations with management and finally, any time the leadership feels management has started a rumor detrimental to the union's security. * * *" (R. 243-244)

"A fourth advantage * * * is the fact that it puts the company completely on the defensive" (R. 244).

"The meetings are called without warning, and take the company by surprise. They find it difficult to make commitments or plan production." (R. 244)

*"This can't be said for the strike. After the initial surprise of the walkout the company knows just what it has to do and plans accordingly * * * (R. 244) (Emphasis supplied)*

Local 232 carried the plan into effect by calling 27 meetings during working hours from November 6, 1945 to March 22, 1946 (R. 158-159) which resulted in work stoppages of a few hours each, without advance notice to, or any specific demand upon, the employer. The employees returned to work in each case at the usual time the following day (R. 158).

These unexpected work stoppages resulted in interference with production, made it impossible to meet deliveries (R. 161-162, 165) and caused an unusual turnover in employment because employees who were dissatisfied with the uncertainty in continuity of work and income left the employment entirely (R. 164, 185-186, 213).

In order to exercise pressure upon the employer, Local 232 also directed workers not to report for work on Saturdays (R. 163), although the employer had issued notice that work was to be scheduled on that day (R. 163). After failing to report for a number of Saturdays, half of the employees reported for work one Saturday (R. 164) without giving notice to the company so as to enable it to have materials ready for production. Following that occurrence, the company posted a notice that in view of the difficulty in scheduling work when there were unexpected stoppages, Saturday work would not be scheduled in any week in which there had been a work stoppage (R. 246).

The petitioners also threatened other employees with harm and inflicted damage upon their property in order

to coerce them into joining the foregoing stoppages. (R. 166, 184-186, 188-190, 192, 194-197, 198-199, 200, 202-204, 206, 207, 212-213, 215, 224).

ARGUMENT

I.

THE PROHIBITION INVOLVED DOES NOT INFRINGE UPON THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION (In reply to pages 16 to 29 of the petitioners' brief).

At the bottom of page 16 of petitioners' brief there has been quoted a statement from the decision of the Wisconsin Supreme Court that the order "operates on individual members of the union as well as the union's officers * * *." These words of the Wisconsin Supreme Court relate only to that portion of the order which is not here challenged, i.e., that portion restricting the petitioners from coercing or intimidating employees by threats of violence or other punishment to join their activities. Since no person either by himself or with others has a constitutional right to coerce and intimidate others by threats and violence, that prohibition can involve no constitutional question. In any event it is not challenged. The quoted words of the Wisconsin Supreme Court did not apply to the challenged prohibition. The latter is limited by its terms to "concerted efforts."

A.

The Prohibition does not Deprive the Petitioners of Rights Secured by the National Labor Relations Act (In reply to pages 17 to 20 of the Petitioners' brief)

Paragraph 7 of the National Labor Relations Act does not purport to protect anything other than lawful concerted activities. See for instance: *Hotel & R. E. I. Alliance v. Wis. E. R. Board*, (1942) 315 U. S. 437, 86 L. ed. 946, 62 S. Ct. 706; *Allen-Bradley Local 1111 v. Wisconsin E. R. Board*, (1941) 315 U. S. 740, 62 S. Ct. 820, 86 L. ed. 1154; *National Labor Relations Board v. Fansteel M. Corp.*, (1939) 306 U. S. 240, 83 L. ed. 627, 59 S. Ct. 490; *National Labor Relations Board v. Draper Corp.*, (C. C. A. 4th, 1944) 145 F. 2d 199; *National Labor Relations Bd. v. Sands Mfg. Co.*, (1939) 306 U. S. 332, 83 L. ed. 682, 59 S. Ct. 508.

Indeed in the only case in which a federal court has passed upon the type of activities here involved they were expressly held to be outside the protection of the National Labor Relations Act. See *C. G. Conn, Limited v. National Labor Relations Board*, (1939) 108 F. 2d 390. The petitioners in this case refused to permit employees to perform overtime work on Saturdays which is the identical situation involved in the foregoing case. There a union declined to permit its members to work overtime.

Generally speaking, concerted activities are unlawful, and therefore unprotected by any provision of federal law, if they are illegal either as to the means used or the objectives sought.

The petitioners have at page 17 of their brief referred to the finding of the Wisconsin Employment Relations

Board that the action of the employees was a concerted effort to exercise economic pressure to compel the employer to comply with the union's demands. The state board did not find, and could not have found, what demands were the objectives of the activities here involved. Many demands were made before, during, and after the activities; but the tenor of the finding was that what the petitioners sought to do by the activities was to "soften up" the employer so that it would be in the mood to accede to whatever demands might be made in the course of future bargaining. There is no question that the respondents had made many demands, and that they were constantly making new demands upon the employer even long after this series of walkouts had ceased (R. 157). There were, however, no specific demands communicated to the employer immediately prior to them. No one could have found as a fact what demands were made upon the employer, the refusal of which would result in work stoppages, because there was too much shifting of position by the petitioners. The testimony shows that no reason was known by the employer at the time of the walkouts why they occurred; that the employer was not told why the employees left the plant until much later (R. 158-159); that two or three walkouts had occurred before the employer was told *anything* about why they had occurred; and that at that time the employer was told that the only purpose was to attend union meetings; that about the middle of December the employer was informed the walkouts were spontaneous manifestations without union authorization (R. 160-161); that the employer was told repeatedly by members of the bargaining committee of Local 232 that they would not call a strike and that these activities were *not* strikes (R. 165); that at least

4 or 5 conferences between Local 232 and the employer were held after the commencement of the stoppages without any reference being made to them at all (R. 180); that some time after the tactics were well under way the employer was notified that it could be instrumental in avoiding walkouts if it "would quit starting rumors intended to undermine the union" (R. 181); that the stoppages were undertaken so that the union would have such control that when *anything* threatened the union's security it would be in a position to counteract (R. 179).

Together with the admitted fact that no notice of any kind was given the employer prior to any of the walkouts, the foregoing resume of testimony makes it clear that if the walkouts were intended to enforce compliance with any specific demands on the part of Local 232, the employer was not informed of that fact.

If it be urged that the concerted activities here involved were predicated on all demands previously made upon the employer, it must be conceded that the objective of the activities was illegal. They included, for instance, a maintenance-of-membership contract. Such a contract is now illegal under the Labor Management Relations Act in the absence of a vote by the employees affected, and was at the time of the activities here involved illegal under the Wisconsin law in the absence of such a vote. State laws restricting such contracts are valid under either the National Labor Relations Act or its successor, the Labor Management Relations Act of 1947. The conference report on the proposed Labor Management Relations Act, House Report 510, 80th Congress, page 60 reads:

"Under the House bill there was included a new section 13 of the National Labor Relations Act to as-

sure that nothing in the act was to be construed as authorizing any closed shop, union shop, *maintenance of membership*, or other form of compulsory unionism agreement in any State where the execution of such agreement would be contrary to State law. Many States have enacted laws or adopted constitutional provisions to make all forms of compulsory unionism in those States illegal. *It was never the intention of the National Labor Relations Act, as is disclosed by the legislative history of that act, to preempt the field in this regard so as to deprive the States of their powers to prevent compulsory unionism.* Neither the so-called 'closed shop' proviso in section 8 (3) of the existing act nor the union shop and maintenance of membership proviso in section 8 (a) (3) of the conference agreement could be said to authorize arrangements of this sort in States where such arrangements were contrary to the State policy. To make certain that there should be no question about this, section 13 was included in the House bill. The conference agreement, in section 14 (b), contains a provision having the same effect.'"
(Emphasis supplied)

During review proceedings in state courts, the petitioners asserted that they never insisted upon maintenance-of-membership, although the record shows clearly that it was one of the demands made before the series of work stoppages and that it had never been expressly abandoned. The shifting of position of the petitioners with respect to what their demands were, depending upon what position is currently most to their advantage, illustrates the need for such a limitation as that imposed by the order under review. The law throughout this country is uniform that coercive concerted action can be justified only by proper objectives. If the objectives of concerted action include

even one to which an employer may not lawfully accede, the concerted action is unlawful and improper.

"An act by an employer which would be a crime or a violation of a legislative enactment or contrary to defined public policy is not a proper object of concerted action against him by workers."

4 Restatement of the Law of Torts, sec. 794.

"When workers engage in concerted action against an employer for more than one object and one or more of the objects are improper, their action is not for a proper object so long as they insist on the improper objects."

4 Restatement of the Law of Torts, sec. 796.

The existence of a valid objective, then, is essential to a lawful strike. The importance of determining the objective is discussed in 4 Restatement of the Law of Torts, Topic 2, p. 117 as follows:

"Significance of object. The object of concerted action is an important factor in determining liability or non-liability for harm caused by the action. Some conduct, for example, physical violence, may be unprivileged in any case. Other conduct, for example, economic pressure by peaceful persuasion or otherwise, may be privileged for one object, such as an increase of wages, and unprivileged for another object, such as the committing of a crime. The nature of the object is, then, an important factor on the issue of liability, but it ordinarily is not the sole factor. Even when the object is proper there are limitations as to the kind of concerted action which may be taken to attain it. * * *"

The state order in this case requires in substance that persons engaging in coercive, concerted action make their position and their objective known. In no other way can it be determined whether activities and objectives are proper.

There is nothing infringing upon either the National Labor Relations Act or the Labor Management Relations Act in a requirement that the nature and the objective of concerted activities be avowed at the time of their inception.

B.

The Prohibition Involved in this Case does not Violate Section 13 of the National Labor Relations Act (In reply to pages 20 to 28 of Petitioners' brief)

Section 13 of the Wagner Act as quoted on page 20 of Petitioners' brief shows by its very wording that it was intended only as a rule to aid in the construction of the provisions of that act. It specifically says that "nothing in this act" shall be construed so as to interfere with the right to strike.

The petitioners devote many pages of their brief to the proposition that their activities should be classified as a strike, or as 27 strikes—which is not clear. Until they sought to raise a federal question, they asserted with equal vigor that they were not striking. If the intent of the participants has any bearing upon the classification of the activities, the petitioners did not engage in a strike. Their position was that if you called their activities "a new form of strike you would be making a bad mistake." Anomalous as it now seems for the same persons to urge now that the same

activities were strikes, we will not argue that question here because the substance of the order as interpreted by the state court does not infringe upon any constitutional guaranties regardless of whether the activities be classed as strikes or otherwise.

The petitioners have quoted the Labor Management Relations Act on page 26 of their brief. The act was not in effect at the time the state court classified the activities. What bearing the petitioners contend that act could have on litigation that was completed before its enactment is not clear, but in any event we do not see how the consideration of the provisions of the latter act could strengthen the petitioners' position. Section 13 of that act, as in the case of the Wagner Act, provides that nothing in the act itself shall be construed to interfere with the right to strike. If it were urged to have any effect other than as an aid in construing the provisions of that law, then the latter part of the same section would have equal effect. It provides that nothing should be so construed as "to affect the limitations or qualifications on that right [to strike]."

The Labor Management Relations Act contemplates that states may place some limitations on the right to strike, when local welfare is involved. If Congress had not recognized that states should exercise some regulatory functions in connection with strikes occurring within their borders, the Labor Management Relations Act would not have provided in section 8 (d) (3) that the appropriate state authorities should be notified of disputes which might lead to strikes.

C.

The Scope of the Prohibition does not Conflict with any Rights Conferred by the Federal Law (In reply to pages 28 to 29 of the Petitioners' brief)

For the purposes of this argument we will assume that Congress could, if it chose, occupy the entire field of labor relations so as to preclude states from regulating in any manner with respect to employer-employee disputes. It has several times been held, however, that Congress did not do so in the enactment of the National Labor Relations Act. There has been no controversy in this case between any agencies of the state or federal government, nor has the state acted in a manner so as to conflict with substantive provisions of the federal law or to usurp the functions of any federal agency. No one has been commanded to do anything which the federal law prohibits him from doing, nor has he been prohibited from doing anything which the federal law requires him to do.

II.

THE STATE HAS MADE NO ATTEMPT TO COMPEL EMPLOYEES IN A LABOR DISPUTE TO PERFORM WORK NOR TO PREVENT THEM FROM PEACEFUL ASSEMBLY (In reply to pages 29 to 39 of the Petitioners' brief)

At page 30 of petitioners' brief they have reworded the cease and desist provisions of the state board's order to try to make it objectionable. The things prohibited by the order of the state board are limited by its own words

and by the further limitations placed upon it in the decision of the supreme court in which it was construed. The petitioners say for instance that "Technically, the refusal of a single member-employee to work part of a day * * * will subject him to punishment for contempt." That is absurd, because the prohibition applies only to "concerted action." The supreme court expressly so stated in answer to that contention which was made before it. The supreme court of Wisconsin said:

"The order of the Board is criticised because it purports to ban employees from quitting work for the purpose of going to work elsewhere, or with intention of not resuming employment with the instant employer for whatever reason. The order has no such far-reaching effect either upon individuals or upon employees acting in concert. What (a) does, and all that it does, is to ban the individual defendants and the members of the union from *'engaging in concerted effort'* to interfere with production by doing the acts *instantly involved.*" (R. 289) (Emphasis supplied)

The petitioners state at page 30 of their brief that there are three separate types of activity which are prohibited by the order. A reading of the words of the prohibition will show that that is not true. The thing prohibited by the state board's order is *not any part of the whole but only a combination of all the enumerated circumstances.* The order does not prohibit the calling of union meetings but rather concerted efforts to interfere with production by arbitrarily calling union meetings and inducing work stoppages during regularly scheduled working hours *other than by going on strike.* The state court said all the order prohibits is the doing of the acts which were instantly in-

volved in this case. It does not prohibit calling of union meetings; it does not prohibit inducing work stoppages; it does not prohibit picketing and boycotting; it does not prohibit any *one* of these activities nor *all* of them unless they are combined in a concerted effort in the same manner as was here done. The banned activities were in effect a unilateral fixing of hours when employees would work (without at any time surrendering control over their jobs), without notice, without a declaration of intention to strike, and without making known the objectives of the activities, but rather upon fictitious pretexts.

A.

The Order Does not Violate the Thirteenth Amendment (In reply to pages 31 to 36 of the Petitioners' brief)

The state board's order does not ban any discontinuance of work, or refusal to report to work. It bans such acts only when done in conjunction with the other circumstances described in the order. The Wisconsin board made no attempt to prohibit striking; but made only certain *limitations* upon concerted refusal to work during certain hours without *any* quitting of employment, either temporary or permanent. The limitation seeks only to ease the impact of the labor dispute upon the public interest by requiring that the position of the parties be made known at the outset. Even if this be regarded erroneously as a limitation upon the right to strike, it would still not violate the 13th amendment.

The right to strike has never been declared immune from regulation. In *Dorchy v. Kansas*, (1926) 272 U. S. 306, 71 L. ed. 248, 47 S. Ct. 86, 87, the supreme court said through the words of Justice Brandeis:

"* * * In the absence of a valid agreement to the contrary, each party to a disputed claim may insist that it be determined only by a court. * * * To enforce payment by a strike is clearly coercion. The Legislature may make such action punishable criminally, as extortion or otherwise. * * * And it may subject to punishment him who uses the power or influence incident to his office in a union to order the strike. *Neither the common law, nor the Fourteenth Amendment, confers the absolute right to strike.* Compare *Aikens v. Wisconsin*, 195 U. S. 194, 204-205, * * *" (Emphasis supplied)

Historically, it has been the right to strike which was doubted rather than the right of the government to curb it. The courts have been concerned primarily with whether, and under what circumstances, strikes could be deemed legal. They have said that employees are not liable for civil damage resulting from a strike for a *bona fide* and legal purpose; and that workmen may withdraw their services singly or in concert so long as they do not violate an express contract or statute.

See: 63 C. J. 665, sec. 17;

Restatement, Torts, sec. 797.

Even if we were to concede that strikes could not be prohibited by blanket enactment, it could still hardly be doubted that certain kinds of strikes could be outlawed, such as strikes for unlawful purposes, or strikes which inter-

fere with public safety, or which exceed the bounds of fair economic pressure.

With respect to the right to cease work a federal court said in *Western Union Tel. Co. v. International B. of E. Workers, Local Union No. 134, et al.*, (District Court, N. D. Illinois, 1924) 2 F. 2d 993, 994:

"As to clause 1 of the prayer for a temporary injunction it is said that it prevents employees from ceasing to work, and therefore imposes involuntary servitude upon them. *The right to cease work is no more an absolute right than is any other right protected by the Constitution.* Broadly speaking, of course, one has the right to work for whom he will, to cease work when he wishes, and to be answerable to no one unless he has been guilty of a breach of contract. * * * These defendants are under no compulsion to accept employment on buildings where plaintiff's equipment is being installed; and, if they do accept it, they are not permitted to make an unlawful use of it."

In *People v. The United Mine Workers of America, District 15, et al.*, (1921) 201 Pac. 54, 70 (Colo. 269, in upholding a statute regulating strikes and lockouts in industries affected with a public interest, the court said:

"There is no involuntary servitude under this act. Any individual workman may quit at will for any reason or no reason. * * *

The case of *State ex rel. Hopkins v. Howat*, (1921) 109 Kan. 376, 25 A. L. R. 1210, 198 Pac. 686, is another in which a law restricting strikes in certain industries was upheld. Writ of error was dismissed in *Howat v. Kansas*, (1922) 258 U. S. 181, 66 L. ed. 550, 42 S. Ct. 277.

A law providing that strikes, to be permissible, must be preceded by an announcement of their purposes would surely not be deemed an invasion of a constitutional right. Such regulations as do nothing more than impose certain conditions in the interest of the public do not violate the constitution.

The restriction which is involved in the order before the court does not extend either to quitting work nor to striking. It is narrowly applied to a particular factual situation.

The petitioners have cited a number of cases to the general effect that striking is lawful. Generally speaking, we do not take issue with the proposition that, *in the absence of statutory restriction*, the right to strike exists subject only to the rules of tort.

The fact that an activity is lawful to the extent that it is not prohibited by statute does not mean that the constitution protects it from all regulation. If that were so, *any* law forbidding something that was permissible at common law would be unconstitutional.

The activities are not lawful even in the *absence* of statute unless supported by a valid objective. Unless we know the demand upon which the activities are predicated, it is impossible for us to know whether they would be lawful even in the absence of statute. An order requiring that coercive concerted activity may be predicated upon avowal of the position and objectives of the perpetrators is little more than a recognition of limitations that exist even in the absence of affirmative regulation.

B.

The Order does not Violate the Fourteenth Amendment (In reply to pages 36 to 39 of Petitioners' brief)

The only portion of the order which could be related to the right of assembly is that part which directs the union and its officers to cease and desist from engaging in any concerted efforts to interfere with production *by arbitrarily calling union meetings and inducing work stoppages during regularly scheduled working hours*. The provision does not prohibit the calling of union meetings *per se*, but only concerted interference with production by "arbitrarily" calling meetings to induce work stoppages. The term "arbitrary" is defined to mean:

"Fixed or done capriciously or at pleasure; without adequate determining principle; not founded in the nature of things; non-rational; * * *"

(Funk & Wagnalls New Standard Dictionary of the English Language)

Certainly the constitutional guaranty to free assembly was not intended to permit it to be used fictitiously as a cloak for quite another illegal purpose. It was admitted by union officials that the plan worked out was not from a *bona fide* desire to hold union meetings but rather to procure work stoppages and thereby exercise economic pressure.

As ruled in *Hotel & R. E. I. Alliance v. Wis. E. R. Board*, (1941) 236 Wis. 329, 294 N. W. 632, 295 N. W. 634; aff. 315 U. S. 437, 52 Sup. Ct. 706, 86 L. ed. 946 (1942), orders are to be interpreted as applicable to the same type of circum-

stances as brought about their issuance. Under that rule it was held that an order might be entered restricting picketing generally, without any violation of the guaranty of free speech, because it would be construed to relate to the objectionable type of picketing which brought about its issuance. The calling of a *bona fide* meeting would not be deemed a violation of the order in the instant case, but only the use of the device of ostensibly calling a meeting as a signal for a totally different purpose.

III.

THE SUBSTANCE AND PURPOSE OF THE ORDER UNDER REVIEW ARE BENEFICENT (In reply to pages 39 to 42 of petitioners' brief)

For the purpose of discrediting the order under review the petitioners seek at pages 39 and 40 of their brief to attribute to it a significance and scope which is neither warranted by the words of the order itself nor the construction placed upon it by the court. We decline to quibble over terminology for the activities engaged in, although we are satisfied that they were not strikes. For purposes of determining whether any rights have been violated, the name assigned is immaterial. All we need know is what has been prohibited—which is the doing of “the acts instantly involved.” *By whatever name they may be called, the prohibited acts were an attempt to take over unilateral control of working hours without notice, without avowal of position or objective, and without release of control over the means of production.*

The greater portion of the petitioners' argument under this heading is addressed to expediency and wisdom of the regulation. While these are not considerations bearing upon constitutional questions we believe the petitioners' arguments are unsound even in the field of policy.

It is suggested that the interests of the employer and the public suffer less from periodic interferences with production than from full-time strikes. Such a viewpoint is concerned only with immediate effects, and disregards the inroads which in the long run would be substantially more devastating to the flow of production.

The legislature is not so much concerned with the loss or impact on the employer or the group of consumers affected by one particular strike as it is with the total inroads which may be made over a period of time by adoption of unfair methods and practices. The legislature is not so much concerned with preventing interruptions of production as it is with insuring that the interruptions be based on some legitimate objective, and that such objective be made known so that the dispute can be judged by the community upon reason and merit rather than by sheer pressure. The ultimate goal is that controversies may tend to be determined by what is right than by who is mightier. No step can be taken in that direction unless the participants be required to make their positions known. The legislative belief is that *ultimate* industrial peace and continuance of production will be best served by evaluating tactics in terms of fairness than by degree of damage in one particular case. It is not unwise or inexpedient to require that industrial warfare be carried on openly enough so that it may be influenced by the light of informed public opinion.

In the long run interference with production can be better avoided by requiring that the position of the parties and the issues in dispute be brought into the open than by limiting the duration of a work stoppage.

CONCLUSION (In reply to pages 42 to 43 of Petitioners' brief)

There is nothing which can better save "our house of freedom," as it is termed by the petitioners, than to maintain standards of fair play and a reasonable balance between adverse interests. To permit unilateral dictatorship by any interest does not serve the cause of freedom.

The legislature has manifested a concern to see that employees should not be helpless and unprotected against arbitrary and unilateral action of the employer; on the other hand, it did not intend to permit unilateral and arbitrary action on the other side which would render individual employees and individual employers as helpless against the maneuvering of a strong international association of workers as the individual employee has formerly been against a powerful employer. While the employer in this case is not a small one, the majority of employers of labor in Wisconsin who are subjected to state regulation have less than 100 employees. If the procedure here utilized by Local 232 were held to be beyond the scope of regulation a strong organization might control, by arbitrary unilateral action, the working hours in any plant—particularly in small ones. There could be no protection of the public; and the interests of the consumer could be as effectively defeated by one master as another. The policy of preserv-

ing reciprocity in bargaining relations instead of unilateral action is in line with the policies adopted by Congress, and surely is not contrary to any constitutional guaranties.

Respectfully submitted,

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APPENDIX A (In reply to pages 45 to 46 of the
Petitioners' brief)

Reference is made in the appendix of petitioners to sec. 111.06 (2) (e) of the Wisconsin statutes, relating to a strike vote. That provision is not involved in this petition. The state court construed the section, but no prohibition in the order was based upon it. The remedy applied is based solely on sec. 111.06 (2) (h); and as stated by this court in *Allen-Bradley Local 1111 v. Wisconsin E. R. Board*, 315 U. S. 740, 62 S. Ct. 820, 824, 86 L. ed. 1154.

"* * * we must read the state act for purposes of the present case as though it contained only those provisions which authorize the state board to enter orders of the specific type here involved. * * *"

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SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1948

Nos. 14 and 15

INTERNATIONAL UNION, U.A.W.A., A.F. of L., LOCAL 232;
ANTHONY DORIA; CLIFFORD MATCHEY, WALTER
BERGER, ERWIN FLEISCHER, JOHN M. CORBETT,
OLIVER DOSTALER, CLARENCE EHLMANN, HERBERT
JACOBSEN, LOUIS LASS,

Petitioners,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E.
GOODING, HENRY RULE and J. E. FITZGIBBON, as
Members of the Wisconsin Employment Relations Board; and
BRIGGS & STRATTON CORPORATION, a corporation,

Respondents.

**BRIEF OF RESPONDENT
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INDEX

Page

Summary of Argument

A. <i>The Right to Strike Is Preserved by the Wisconsin Law and Is Not Involved in This Case</i>	1
--	---

Wisconsin is a leader in advanced social legislation for the protection of individual and civil rights.....	2
---	---

Wisconsin protects the right to strike, both by court decisions and specific statutes	2, 3
---	------

Wisconsin Employment Peace Act represents the Wisconsin public policy to protect all of the public, including both employers and employees.....	3, 4
---	------

B. <i>Findings of Fact Are Supported by Credible Evidence</i>	5
---	---

Case turns on the question of whether the Board's findings of fact are supported by the evidence.....	5
---	---

1. The law governing the case is that the findings if supported by substantial evidence will not be disturbed on appeal	5
---	---

2. Analysis of the facts supports the Board's finding that the work stoppages were engaged in for the purpose of interfering with production and that no strikes were called or took place....	5
--	---

3. Finding that the production interferences were not strikes is based on essential factual elements and substantial evidence	13
---	----

There is no strike where there is no intent to strike	13
---	----

Intent is a question of fact. On the facts disclosed it was clear that the employees through their conduct did not strike 14

History, definitions and understanding of what constitutes a strike are analyzed establish that the procedure here was not a strike 16-27

4. The purpose of the procedure was to control the means of production and fix the working conditions by means other than a strike..... 27

The "new tactics" were similar to the illegal sitdown strike 27

The essential element of an employer-employee relationship is the right of the employer to control the time and method of work and the employee's duty to comply with reasonable rules.. 28

The employee by accepting the benefits of employment agrees to work reasonable hours fixed by the employer;—he agrees not to fail to work except for certain well recognized excuses, including the right to strike..... 28

The 'employees' tactics repudiated the fundamental characteristics of the relationship and were in effort to fix the hours of work while maintaining control of the tools of production and preventing others from working in their place 29

The Wisconsin Act, while preserving the right to strike, banned concerted efforts to interfere with production in the manner followed here.... 29

The Union's argument is predicated on the fundamentally fallacious assumption that any concerted activity of employees which they believe to be for their benefit may be engaged as a matter of right under the Constitution and the federal law	31
That view is a perversion of the beneficial purpose of the National Labor Relations Act..	32
5. The factual situation shows that there is no impairment of any federally guaranteed right..	32
The National Labor Relations Act guaranteeing the right of certain concerted activities is necessarily limited to lawful activities.....	33
That Act does not guarantee the right of employees repeatedly and without warning to hold purported meetings, either on or off the company's premises during working hours where the purpose is to destroy production and require the employer to permit the employees to work whenever they wish	34
The tactic if protected without any control would enable the employees to prescribe all of the fundamental conditions relating to the employment and virtually destroy management's function	36
The right of lawful assembly and freedom of speech is in no way impaired by the Wisconsin legislation	37

<i>C. The Attacked Section of the Wisconsin Act Relates to a Subject Not Pre-empted by Federal Law and is a Reasonable Exercise of the State's Police Power</i>	38
The validity of the regulation is tested by the Wisconsin Supreme Court's determination limiting the effect of the Board's order to the facts instantly involved.	38
It is of prime public interest that the tools and means of production be not arbitrarily obstructed, excepting in the event of a lawful strike.....	39
The court will not substitute its judgment for that of the legislature as to the best way of protecting the public welfare, unless it clearly appears that the particular method of regulation is forbidden by the Constitution or express Federal Legislation	40
D. CONCLUSION	42

AUTHORITIES

Cases Cited

Baker v. W.U.T. Co., 134 Wis. 147; 14 N.W. 439....	14
Cudahy Packing Co., 29 N.L.R.B. 837.....	17
C. G. Conn Limited v. National Labor Relations Board, 108 Fed. 2d 390	18, 35
Harnischfeger Corp., 9 N.L.R.B. 676	17
Home Beneficial Life Ins. Co. v. N.L.R.B., 159 Fed. 2d 280 (4th.CCA)	17

Milkdrivers Union v. Meadowmoor Dairies, 312 U.S. 287; 85 L. Ed. 836; 61 Sup. Ct. 552.....	26
Mt. Clemens Pottery Co., 46 N.L.R.B. 714.....	17
National Labor Relations Board v. Fansteel Metallurgical Corp., 306 U.S. 240, 80 L. Ed. 627.....	17, 27
National Protective Association of Steam Fitters and Helpers v. Cummings, 170 N.Y. 315.....	16
New York State L.R.B. v. Union Club of the City of New York, 266 App. Div. 616.....	17
Niles Firebrick Co., 30 N.L.R.B. 426.....	17
Retail Clerks' Union v. Wisconsin Employment Relations Board, 242 Wis. 21; 6 N.W. 648.....	14
Sandoval v. Industrial Commission, 110 Colo. 108, 130 Pac. 3d 930.....	20
Truax v. Corrigan, 257 U.S. 316; 66 L. Ed. 254; 42 Sup. Ct. Rep. 124.....	26
Walter W. Oefflein, Inc. v. State, 177 Wis. 394; 188 N.W. 633.....	21
West Allis Foundry Company v. State, 186 Wis. 24; 202 N.W. 302.....	22
Wisconsin Employment Relations Board v. Allis-Chalmers Workers' Union, 252 Wis. 43; 30 N.W. 183.....	1, 4
Zillmer v. Kreutzberg, 114 Wis. 530; 90 N.W. 1098.....	1, 21

Statutes Cited

Wisconsin Statutes, Section 103.43(1) (a)	2, 23
Wisconsin Statutes, Section 103.53(1)	2
Wisconsin Statutes, Section 111.01	2
Wisconsin Statutes, Section 111.04	2
Wisconsin Statutes, Section 111.06(2) (a) (b)	3
Wisconsin Statutes, Section 111.07(7)	5
Wisconsin Statutes, Section 111.15	4
Act of June 25, 1943, Public Law 89, 78th Congress	20
Act of July 5, 1935, Chapter 372, 49 Stats. 499 U.S. Code, Title 29, Section 151-166; Section 1	16

Other Authorities

32 Am. Jur. 445-6	28
35 Am. Jur. 478	28
Restatement of the Law of Torts, Volume 4, Section 797	16

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Members of the Wisconsin Employment Relations Board; and
BRIGGS & STRATTON CORPORATION, a corporation,

Respondents.

BRIEF OF RESPONDENT BRIGGS & STRATTON CORPORATION

(See Index for Summary of Argument)

A. THE RIGHT TO STRIKE IS PRESERVED BY THE WISCONSIN LAW AND IS NOT INVOLVED HERE

No question is involved in this case as to the right of employees in Wisconsin to strike. That right has long been expressly recognized and protected both by court decisions, State ex rel *Zillmer v. Kreutzberg*, 114 Wis. 530, 90 N.W. 1098 (1902); *Wisconsin Employment Re-*

lations Board v. Allis-Chalmers Workers Union, 252 Wis. 43, 30 N.W. 2d 183 (1947), and by several statutes;

"The following acts, whether performed singly or in concert, shall be legal: (a) ceasing or refusing to perform any work * * *." *Wis. Stats.* 103.53(1)

"Employees shall have the right * * * to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *." *Wis. Stats.* 111.04 (emphasis supplied)

Unlike most states, Wisconsin even has what amounts to a statutory definition of a strike:

"A strike or lockout shall be deemed to exist as long as the usual concomitants of a strike or lockout exist; or the unemployment on the part of the workers affected continues; or any payment of strike benefits is being made; or any picketing is maintained; or publication is being made of the existence of such strike or lockout." *Wis. Stats.* 103.43(1a)

Wisconsin is recognized as a leader in enlightened, advanced, social legislation and a zealous guardian of individual and civil rights. In 1939 it enacted the Wisconsin Employment Peace Act, *Wis. Stats.* Chap. 111, (referred to herein as the Act), a carefully drawn, comprehensive code of labor relations for the protection of employers, employees and the public.

Its statement of purpose repudiates the attack here made upon it and in part is as follows:

"Section 111.01. The public policy of the state * * * is declared to be as follows:

"(1) * * * There are three major interests involved namely, that of the public, the employe and the employer. * * * It is the policy of the state to protect and promote each of these interests with due regard to the situation and to the rights of others.

"(2) Industrial peace, regular and adequate income for the employe, and uninterrupted production of goods and services are promotive of all of these interests.

"(4) It is the policy of the state, in order to preserve and promote the interests of the public, the employe and the employer alike, to establish *standards of fair conduct* in employment relations and to provide a convenient, expeditious and impartial tribunal by which these interests may have their respective rights and obligations adjudicated. While limiting individual and group rights of aggression and defense, the state substitutes processes of justice for the more primitive methods of trial by combat." (Emphasis supplied)

The Act then sets out the guaranty of protection for lawful concerted activities (Section 111.04 quoted above), and then designates as "unfair", a number of activities of both employers and employees recognized to be harmful and detrimental to employees, employers and the public.

As pertains to this case, the following practices of employees, individually or in concert, are denominated as unfair conduct.

"Section 111.06(2)(a) To coerce or intimidate an employe in the enjoyment of his legal rights, including those guaranteed in Section 111.04, or to intimidate his family, picket his domicile, or injure the person or property of such employe or his family.

"(h) To take unauthorized possession of property of the employer or to engage in any concerted effort to interfere with production except by leaving the premises in an orderly manner for the purpose of going on strike." (emphasis supplied)

The last section is the one particularly criticized by the Union here.

The Act sets up the Wisconsin Employment Relations Board (called the Board herein) to administer its provisions and provides the procedures for filing charges, conducting hearings and for court review.

Finally and conclusive of Wisconsin's positive protection of the right to conduct a lawful strike, the Act provides:

"Except as specifically provided in this chapter, ~~nothing~~ therein shall be construed so as to interfere with or impede or diminish in any way the right to strike or the right of individuals to work; nor shall anything in this chapter be so construed as to invade unlawfully the right to freedom of speech."
Section 111.15 Wis. Stats.

The brief of the Wisconsin Attorney General demonstrates that the section attacked, as interpreted by the Wisconsin Supreme Court, *in its application to the facts* presented, constitutes no deprivation of any constitutional or federal right. It is a reasonable curb upon unbridled license and unwarranted attempts at seizure and control of the means of production and livelihood, while leaving inviolate the right of employees to withhold their service and to exert economic pressure on employers through a recognizedly lawful strike.

The Wisconsin Supreme Court has correctly summarized the principle involved in this case as follows:

"The right to strike is a valuable right which not only the congress and legislatures of the various states but the courts, federal and state, have sought to guard and protect, but the right to strike does not include the right to commit assaults, destroy property, *deprive other people of the right to earn their living in the place where they are employed.*" *Wisconsin Employment Relations Board v. Allis-Chalmers Workers Union*, 252 Wis. 43, at 51 (1947) (emphasis supplied)

B. THE FINDINGS OF FACT ARE SUPPORTED BY COMPETENT CREDIBLE EVIDENCE

1. The Rule Governing the Case.

The Wisconsin Act provides:

"Findings of fact made by the Board, if supported by credible and competent evidence in the record, shall be conclusive." *Wis. Stats.*, Section 111.07(7)

The rule that findings of fact, both of courts and properly empowered administrative tribunals, will not be disturbed on appeal if supported by substantial evidence is so elementary, and has been so frequently and emphatically declared and adhered to by this court that citation of authorities is unwarranted. This case in its last analysis rests upon a question of fact.

The Board found as the essential facts, "That all such work stoppages were engaged in for the purpose of interfering with the production of the company * * * " (Finding 8, R. 16) and " * * * no strike has been called by the respondent union nor by the employees of the Briggs & Stratton Corporation against the company at any time" (Finding 11, R. 17).

Because in our view that the case turns on the single question of whether these findings of fact are supported by the evidence, a somewhat detailed analysis of the facts constitutes a necessary portion of our argument.

2. Analysis of the Facts.

Briggs & Stratton Corporation (herein termed "Company") is a manufacturer, principally of small gas engines, automobile locks and kindred products, with two plants about 1 1/2 miles apart, known as the "East" and "West" plants, in the City of Milwaukee, Wisconsin.

sin (R. 33). There were approximately 1,000 employees in each plant (R. 33). The bulk of Company's production employees are represented by the Petitioner Union, and no other union is a bargaining representative for any of Company's employees (R. 33).

A contract between Union and Company expired July 1, 1944 (R. 15). During 1944 and 1945, there had been proceedings, at the instance of the Union, before the National War Labor Board in respect to demands for maintenance of membership, check-off, vacations, wages and other items, and while there had been bargaining negotiations, no new contract was reached during that period. (R. 35).

The East Plant first shift hours were from 8 A.M. to 5 P.M., and from 3:30 P.M. to 12 Midnight for the second shift. At the West Plant the shifts were from 7 A.M. to 3:30 P.M. and 3:30 P.M. to Midnight (R. 35). Those had been the regularly scheduled hours for a considerable period (R. 35). Both plants had been operating steadily, most of the production employees being on a five-day week (R. 35).

The first of the incidents out of which this litigation arose, occurred on November 6, 1945 when at 1:30 P.M., without previous notice or warning to the Company, 1,322 employees on the first shift in both plants left their work (R. 36), and none of the 205 employees on the second shift reported for work (R. 36). The first shift employees did not return to work that day. All entered the plants to work the next morning (R. 36). At that time no reason was given to Company for this production stoppage (R. 36).

On November 16, 1945, 614 first shift employees at the East Plant and 746 employees at the West Plant left

work without notice at 1:30 P.M., (only 13 remaining), but the second shift employees at both plants reported and worked (R.36).

From the first occurrence on November 6, 1945, up to March 22, 1946, twenty-seven of such production tie-ups occurred (R. 36). The starting times of the interferences varied,—sometimes commencing at 11:00 A.M., or 9:30 A.M. and even as early as 8:30 A.M. (R. 37). With one exception, when timekeepers returned, none of the employees who left their work returned to work during that shift (R. 36). On January 7, 1946, a number of employees in both plants, without leaving the plants, engaged in a sitdown lasting throughout the shift, resulting in a general cessation of production (R. 36-37).

The production interferences, including two failures to report in on scheduled work days, were spaced as follows:

1945

Tuesday,	November 6,	Thursday,	December 20,
Friday,	November 16,	Monday,	December 24,
Tuesday,	December 4,	Friday,	December 28,
Thursday,	December 6,	Monday,	December 31,

1946

Monday,	January 7, (sitdown)	Friday,	February 15,
Tuesday,	January 8,	Thursday,	February 21,
Friday,	January 11,	Friday,	February 22,
Wednesday,	January 16,	Monday,	February 25,
Friday,	January 18,	Friday,	March 1,
Wednesday,	January 23,	Tuesday,	March 5,
Friday,	January 25,	Friday,	March 8,
Monday,	February 4,	Thursday,	March 14,
Wednesday,	February 6,	Friday,	March 15,
Friday,	February 8,	Wednesday,	March 20,
Wednesday,	February 13,	Friday,	March 22,

(Exhibit 2, (R. 37; 86))

Each of the occurrences completely stopped production at both plants. After the second or third stoppage, the Union's bargaining committee (including some of the Petitioners) told the Company's production vice-president that the reason for the stoppages was so that the employees could attend a Union meeting (R. 37). About the middle of December, 1945 the Union's bargaining committee told the same Company officer that the stoppages were "spontaneous", caused by the employees and not by action of the Union (R. 37). The bargaining committee repeatedly told the Company's production vice president that these stoppages *were not strikes*, and that they would not call a strike (R. 39).

On February 10, 1946, *The Milwaukee Journal*, a daily newspaper, published a report of an interview with petitioner Anthony Doria, Secretary-Treasurer of the International Union, with which the Petitioner Union is affiliated. The report (Exhibit 6, R. 46, 86-89) which Mr. Doria testified quoted him substantially correctly (R. 45-46) noted these statements of Mr. Doria in respect to the conduct being engaged in at Company's plants:

"If you called this a new form of strike you would be making a bad mistake." (R. 87)

"It is a labor weapon actually designed to avoid a strike and the hardships which a strike imposes on the workers. We think it is a better weapon than a strike." (R. 87)

"We analyzed the picture very thoroughly before we arrived at this idea." (R. 87)

"Under the new method meetings are called for anyone or more of three possible reasons — any new development in negotiations which might arise with respect to neutral labor boards, any development in

direct negotiations with management, and finally any time the leadership feels management has started a rumor detrimental to the Union's security." (R. 87-88)

"The meetings are called without warning and take the Company by surprise. They find it difficult to make commitments and plan production." (R. 88)

"This can't be said for a strike. After the initial surprise of the walkout the Company knows just what it has to do and plans accordingly." (R. 88)

"Management can't plan for this new sort of thing." (R. 88)

"Then if, as a last resort, management decides to close shop and force the workers out, it can properly be called a lock-out." (R. 88)

Mr. Doria further said that the new weapon was predicated on the section of the National Labor Relations Act "which states that every group of employees is entitled to engage in activities for its mutual protection". (R. 88)

Subsequently, at the hearing before the Board, Mr. Doria testified that the intent of the stoppages was to interfere with production; that the plan was his idea; that he wanted to avoid the hardship of a strike; that the method was accepted to replace the full time strike; that they wanted to use some form of economic pressure (R. 47); but that the real purpose was to interfere with production (R. 49).

During the period in question, work at Company's plants was scheduled a month or forty-five days in advance on the basis of working full time (R. 38). The work interruptions greatly curtailed production, delayed shipments to customers (R. 37), caused inventories to pile up in the plants (R. 38), and the Company sustained

substantial loss and damage from the production stoppages (R. 40). The stoppages caused an unusual turnover of employees (R. 39).

Company did not discharge, lay-off, or discipline any employees as a result of these activities (R. 36, 40), though it repeatedly requested the Union's bargaining committee to stop these tactics (R. 40).

A number of employees who refused to participate in the procedure had their lockers, clothing, tools and other personal property damaged, stolen, or concealed, and were subjected to threats, coercion, and intimidation (R. 50-70).

There was no vote taken by secret ballot to call a strike preceding any of these work interferences (R. 66).

On February 23, 1946, the Company filed a complaint with the Board against the Petitioners, consisting of the Union, its officers, and bargaining committee, alleging that the conduct described constituted unfair labor practices under the Wisconsin Act and praying for a cease and desist order (R. 25-29), to which Petitioners answered (R. 30-31). Trial was had before the Board commencing March 26, 1946 (R. 32), at which the testimony developed without material dispute, the facts hereinbefore set out (R. 33-86).

On May 11, 1946, the Board made its findings of fact and conclusions of law and order, accompanied by a memorandum opinion (R. 14-21). Among other things, the Board found as facts that on the twenty-seven occasions in question the employees left their employment during working hours without consent of the Company, at the instigation of the Petitioners, to attend Union meetings "for the purpose of interfering with the production

of the Company" to compel the Company to accede to the Union's demands (R. 16); that Petitioners threatened employees who failed to engage in such work stoppages and several of such employees had their lockers, clothing or tools damaged or concealed and were subjected to assaults and threats of violence, principally on Company's property (R. 16); that Company's employees in the bargaining unit represented by Petitioner Union "never conducted a vote of any kind at which the Union was directed to call a strike, and that no strike had been called by the Union or by the employees at any time" (R. 16).

As conclusions of law, the Board found that Petitioners were guilty of unfair labor practices under the Wisconsin Act by

"(a) Engaging in a concerted effort to interfere with production in a manner other than by leaving the premises in an orderly manner for the purpose of going on strike.

"(b) Coercing and intimidating employees by threatening punishment if they fail to engage in such unlawful efforts to interfere with production." (R. 17)

The Board's order directed Petitioners to cease and desist from such or other concerted interferences with production except by leaving the premises in an orderly manner for the purpose of going on strike (R. 17-18), and to cease such coercion or intimidation of other employees (R. 18); and directed the Petitioners to post notices that the Petitioners would cease such conduct (R. 18).

The Petitioners failed to comply with the Board's order and the Attorney General of Wisconsin, acting for

the Board, instituted proceedings in the Circuit Court of Milwaukee County for confirmation and enforcement of the Board's order (R. 12-14), to which the Petitioners answered (R. 21-22).

The Petitioners also commenced proceedings pursuant to the Wisconsin Act to review the Board's findings and order and the two proceedings were consolidated for purposes of "hearing, argument and decisions" (R. 23).

The Circuit Court heard the matter on the record (R. 23) and the presiding judge filed a decision (R. 1-12), in which he concluded that leaving the Company's premises to attend union meetings, thereby creating work stoppages, constituted a "strike" within the exception of the Wisconsin Statutes (R. 6, 10) and that the Wisconsin Board's order to cease and desist was in this respect erroneous (R. 10); but that the portion of the Board's order directing cessation of intimidation of other employees was entitled to enforcement (R. 10-11). Judgment was entered modifying the Board's order by striking the part determined to be erroneous but adjudging that the other part of the order be enforced (R. 23-25).

1 From that judgment, the Wisconsin Board and the Company, separately, appealed to the Supreme Court of the State of Wisconsin (R. 98-99) and Petitioners filed notice for a cross review of that portion of the Board's order confirmed by the Circuit Court judgment (R. 101-102). The Supreme Court of Wisconsin reversed the judgment of the Circuit Court and remanded the cause with directions to enter judgment sustaining the order of the Board as interpreted by the Wisconsin Supreme Court and for enforcement of that order (R. 121).

3. The Findings that the Production Interferences Were Not Strikes Is Based on Essential Factual Elements Supported by Substantial Evidence.

Whatever definition or concept may be adopted as a standard, a "strike" cannot be inadvertent. Inherent in any concept of the term must be intention and volition. The quitting of the employment must be with the *intent to strike*. If the intent be with any other purpose it cannot and does not conform to either the popular or the legal understanding of action comprehended within the term "strike". Here the Petitioners caused the Company's employees to stop production entirely in both plants by breaking off work in the middle of a work day with no intention whatever of going on a strike but with the definite purpose of resuming work the next day.

This was done repeatedly over a period of months, on a pattern of unpredictable timing calculated to damage the Company by crippling production and preventing the Company from conducting a planned, integrated and continuous operation of its business. At no time during the period while these production interferences were being inflicted did the Petitioners attempt to negotiate with the Company for cessation of the practice as a part of or on any terms of collective bargaining.

The Petitioners repeatedly asserted to the Company that these production stoppages were for the sole purpose of the employees attending union meetings. They did in fact actually attend meetings and if the purpose was in fact to attend such meetings, then obviously the purpose was *not* to go on strike. Certainly the Board was justified in drawing the inference that no strike took place.

Petitioners also asserted to the Company at another time that the production stoppages to attend such union

meetings were not at the instance of the Petitioners but were the "spontaneous" action of the employees who were union members. These representations were later proven to be untrue when at the hearing before the Board, Petitioner Doria testified as to his origination of these tactics as means of inflicting economic pressure on the Company while at the same time *avoiding* having the employees go on strike and also denying to the Company any protective procedure which would have been available to it had the employees actually gone on strike.

Further evidence that the animating concept and intent was not to strike was the fact shown by the evidence and found by the Board that at no time had a vote of the employees been taken by secret ballot for a strike, a condition without which a strike would be an unfair labor practice under the Wisconsin Statutes (Section 111.06(3)(e)).

The matter of intent is not a matter of law; it is a matter of fact.

"Such an intent already formed is a fact just as much as any other physical fact." *Baker v. W.U.T. Co.*, 134 Wis. 147 at 153; 114 N.W. 439 (1908); *Retail Clerk's Union v. Wisconsin Employment Relations Board*, 242 Wis. 21; 6 N.W. 2d 698 (1942)

There is another significant factual feature of the procedure. While it is no doubt true that one of the purposes was to coerce the employer into acceding to demands, it was established as a fact before the Board that that was not the sole, nor perhaps even the most important purpose. In fact Exhibit No. 6 quotes Mr. Doria as saying that the "meetings are called for anyone or more of three possible reasons,—any new development in negotiations which might arise with respect to neutral labor boards, any development in direct negotiations with management

and finally any time the leadership feels management has started a rumor detrimental to the union security" (R. 87-88).

At the hearing Mr. Doria said he didn't use the expression "neutral labor boards" but had meant any agency of government having jurisdiction (R. 46). However, while the Union's brief emphasizes the "demand" purpose, the important point is that the Union's position, if sustained here, would mean the production interferences could be indulged in even when the Union had no bargaining demand whatever and at any time the "leadership feels" management has done something which is detrimental to union security. Furthermore, the facts demonstrated that in the instant situation no specific bargaining demands were ever made before each or any of the walkouts.

In other words, the cessation of these coercive efforts was never presented to the Company, directly or indirectly, by the Petitioners as a condition which would obtain if either particular or general bargaining demands were met. So far as the Company and the Board were ever informed, even if the Company acceded to whatever the Union demanded, the "weapon" would still remain aimed at the employer to be used at the pleasure of the "leadership" according to the whims of its "feelings".

Whether a given activity is a strike is a question of fact. The Petitioners formulate some elements of a strike at page 35 of their brief, indicating reliance on Webster's Dictionary. We do not find in the Webster edition cited the elements as set forth in Petitioners' brief. We do find as the first element "an act of *quitting*", not merely "*stopping*" work. However, what the courts have said is more applicable here than a dictionary definition.

Section 1 of Act of July 5, 1935, 49 Stat. 499, U. S. Code, Title 29, Sec. 151-166 (Wagner Act 1935) provides:

"* * * refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife * * *" (our emphasis)

This recognizes the existence of other forms of economic warfare or labor weapons different from strikes.

In Section 2(3) of that Act, an "employee" is defined to "include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute * * *" (our emphasis). Thus employees who are on *strike* retain their status as employees and such a situation exists only when the employees have "*ceased*" (stopped, ended) their work and not when they are insisting on continuing to work with self-declared, intermittent, interruptions.

The case of *National Protective Association of Steam Fitters and Helpers v. Cummings*, 170 N.Y. 345, states a commonly accepted definition of a strike thus, "A strike is to *cease* working in a body by pre-arrangement until a grievance is redressed". (our emphasis)

The Restatement of the Law of Torts, Volume 4, Section 797, defines a strike as follows:

"A strike is a *continued* refusal by employees to do any work for their employer, or to work at their customary rate of speed until the object of the strike is attained, that is, until the employer grants the concession demanded." (our emphasis)

The same authority points out that it is not a strike if employees *temporarily* stop work, even though using the stoppage as an attempt to exact a concession and gives the following illustration:

"A's employees, after consulting with each other, decide to have a picnic on a certain day. They request A's permission to be absent on the afternoon of that day. A refuses. The employees nevertheless cease work at noon and hold their picnic. *This stoppage is not a strike.*" (our emphasis)

There are many types of concerted activities by employees to bring pressure upon employers to yield concessions which have not been recognized to be strikes or to be legitimate, for example, the slow-down; a refusal to work scheduled hours as in *Mt. Clemens Pottery Co.*, 46 N.L.R.B. 714; a refusal to do assigned work as in *Niles Firebrick Co.*, 30 N.L.R.B. 426; ten to twenty minute stoppages of the production line in *Cudahy Packing Co.*, 29 N.L.R.B. 837; the refusal of waiters to serve meals at the scheduled time in *New York State L.R.B. v. Union Club of the City of New York*, 266 App. Div. (N.Y.) 516; the attempt to control shift time by coming in early as in *Harnischfeger Corp.*, 9 N.L.R.B. 676; the boycott; the refusal to work on material from strike-bound plants; the refusal to work on non-union goods and the sit down so severely condemned by this court in *National Labor Relations Board v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 80 L. ed. 627.

Another union announced its own schedule of days on which certain employees would report. This was properly condemned by the court in *Home Beneficial Life Ins. Co. vs. N.L.R.B.*, 159 Fed. 2d 280, (4th CCA) (1947). In that case the union representatives carefully avoided the use of the word "strike" for the concerted withholding of work on certain scheduled days. The Union did declare and stage a genuine strike somewhat later. The court held *the original activity did not amount to a strike* and said:

"The statute (Sec. 7 (Wagner Act), * * * does not and could not confer on them (the employees) the *right to engage en masse in unlawful activities*, or, to defy the authority of the employer to manage his business *while remaining in his service*. When they engage in an unlawful sit-down strike, as in (cites *Fansteel* case), they may be discharged by an employer, even though he has been guilty of unfair labor practices; and when, as here, *they refuse to obey the rules laid down by a law-abiding management for the conduct of the business*, they may be discharged and their places may be permanently filled". @ 284 (our emphasis and parenthetical insert)

A situation practically identical with the facts here is found in *C. G. Conn Limited v. National Labor Relations Board*, (7th C.C.A.) 108 Fed. 2d 390 (1939) where, when certain wage demands were not granted, the employees, without prior notice, stopped work in a body before the end of the scheduled work period, but returned to work at the regular time the next day indicating that they intended to continue the practice. The employees were disciplined and they brought charges of unfair labor practices before the National Labor Relations Board asserting that the procedure was a "strike" for which the employer could not impose discipline.

Because the factual situation is so close to that here and the court's analysis so ably points out the impropriety of the conduct on general principles we quote at some length for the convenience of the court:

"We are supplied with numerous definitions of the word 'strike'. They are all substantially alike and we quote from *American and English Encyclopedia of Law*, Volume 24, page 423, as follows: 'The term "strike" is applied commonly to a combined effort on the part of a body of workmen employed

by the same master to enforce a demand for higher wages, shorter hours, or some other concession, by stopping work in a body at a pre-arranged time, and refusing to resume work until the demanded concession shall have been granted.' " @ 396

"We are of the opinion that the facts in the instant situation do not bring the discharged employees within this or any other definition of the word 'strike' of which we are aware. We are unable to accept respondent's argument to the effect that an employee can be on a strike and at work simultaneously. We think he must be on the job subject to the authority and control of the employer, or off the job as a striker, in support of some grievance." @ 397

* * *

"(8) Even, if it be assumed that there was a labor dispute, within the meaning of 2(9) the fallacy of this argument to us lies in the fact that the employees did not cease work in consequence of such dispute. Undoubtedly, when petitioner refused to comply with their request, there were two courses open. First, they could continue work, and negotiate further with the petitioner; or, second, they could strike in protest. They did neither, or perhaps it would be more accurate to say they attempted to do both at the same time. We have observed numerous variations of the recognized legitimate strike, such as the 'sit-down' and 'slow-down' strikes. It seems this might be properly designated as a strike on the installment plan.

"We are aware of no law or logic that gives the employee the right to work upon terms prescribed solely by him. That is plainly what was sought to be done in this instance. It is not a situation in which employees ceased work in protest against conditions imposed by the employer, but one in which the employees sought and intended to continue work upon their own notion of the terms which should prevail. If they had a right to fix the hours of their employ-

ment it would follow that a similar right existed by which they could prescribe all conditions and regulations affecting their employment." @397 (our emphasis)

In the case of *Sandoval v. Industrial Commission*, (1942), 110 Colo. 108, 130 Pac. 2d 930, the court said:

"A strike possesses at least four ingredients other than the suspended employer-employee relationship which has been mentioned, namely: (1) A demand for some concession, generally for a modification of conditions of labor or rates of pay; (2) a refusal to work with intent to bring about compliance with the demand; (3) an *intention* to return to work *when compliance is accomplished*; * * * " (our emphasis)

The Act of June 25, 1943, Public Law 89, 78th Congress (Smith-Connally Act) was for the purpose of trying to reduce strikes, Section 8-A provided that;

"(1) The representative of the employees of a war contractor, shall give to the Secretary of Labor, the National War Labor Board, and the National Labor Relations Board, notice of any such labor dispute involving such contractor and employees, together with a statement of the issues giving rise thereto.

* * *

"(3) On the thirtieth day after notice under paragraph (1) is given by the representative of the employees, unless such dispute has been settled, the National Labor Relations Board shall forthwith take a secret ballot of the employees in the plant, plants, mines, mine, facility, facilities, bargaining unit or bargaining units, as the case may be, with respect to which the dispute is applicable on the question whether they will permit any such interruption of war production."

It is highly significant that *no notice or vote to comply with that Act was ever taken in this case* and shows that

the employees here and their Union never deemed their procedure to be a strike.

The Wisconsin law contains a somewhat similar requirement for a strike vote and the Union's failure to comply with that requirement also proves the same thing.

Obviously Congress never intended that a series of short intermittent walkouts would be deemed strikes since if they were, then before each of the walkouts, the employees would have to give a thirty day notice and the Board would have had to conduct a strike vote,—in this case twenty-seven between November, 1945 and March, 1946. No such ridiculous situation was contemplated by Congress and the obvious conclusion is that such tactics were never deemed by Congress to rise to the dignity of a strike.

The earliest Wisconsin case dealing with the meaning of the word strike is *State ex rel Zillmer v. Kreutzberg*, 114 Wis. 530, 590 N.W. 1098, (1902) where the court said:

" * * * included in the meaning of the word 'strike' was the mere concurrence of a number of individuals in the exercise of their inherent right to quit their employment, * * * " (our emphasis) @ 536.

In the case before the court, the employees vigorously claim they did not in any sense "quit", but on the contrary assert they held on to their jobs which they could work at hours fixed by themselves.

In *Walter W. Oeflein, Inc. v. State*, 177 Wis. 394, 188 N.W. 633 (1922) the question was whether a strike was in existence when an employer advertised for labor. If it was, the employer had violated (present) Section 103.43 Wisconsin Statutes which prohibits advertising

for labor without indicating that a strike is in existence, if such is the fact. The court said:

"Webster's New International Dictionary, on page 2058, defines the word 'strike' as follows: 'An act of *quitting* when done by mutual understanding by a body of workmen as a means of enforcing compliance with demands made on their employer'."

* * *

"The number of men necessary to constitute a strike in refusing *to continue work*, pursuant to united effort, *depends in each case upon the peculiar facts in the case*, and no definite rule can be laid down. The legislature did not see fit to define the term 'strike', but on the contrary used the term *in the sense that it is ordinarily used* in connection with labor troubles and as defined by standard authorities upon the subject." @399 (our emphasis)

In 1925 the Wisconsin Supreme Court was again confronted with a prosecution under the same statute and said:

"There can be no question but that when by concerted action, a number of the company's employees *quit work* on October 22nd because of the proposed cut in wages, they then entered upon a lawful strike as such term is understood and declared." *West Allis Foundry Company v. State*, 186 Wis. 24, @ 28, 202 N.W. 302 (our emphasis)

The majority held that the strike had ended but Justice Charles H. Crownhart, well known friend of labor, wrote a dissenting opinion to the effect that, on the facts, the strike still existed. A portion of his remarks have important bearing on the subsequent Wisconsin law:

"*The real test of a strike must be: Are the usual concomitants of a strike still attached to the situation; are the men still out; are pickets kept up; are the union and union papers still publishing notices*

of the strike; is pressure still maintained on the employer by which he is burdened financially, or physically and mentally impressed; are men prevented from accepting employment at the plant by reason of the conditions existing with reference thereto; are strike benefits *still* being paid; is the action of the employees, or the union in their behalf, to maintain the strike in good faith with some hope of ultimate success? If any or all of these questions may be answered in the affirmative, there is some evidence of a strike actually existing, *and if most of them exist*, as they did in this case, then the *fact* of a strike actually existing is sufficiently established, as the term 'strike' is used in the act before us." (our emphasis) @39

This decision was rendered in February, 1925 and in June, 1925, the Legislature enacted Wisconsin Statute, Section 103.43 (1a) and thereby incorporated into the Wisconsin statutory law this definition of a strike previously quoted herein:

"A strike or lockout shall be deemed to exist as long as the *usual* concomitants of a strike or lockout exist; or the *unemployment* on the part of the workers affected continues; or any payments of strike benefits is being made; or any picketing is maintained; or publication is being made of the existence of such strike or lockout." (our emphasis)

This definition accords with the general understanding and confirms the proposition that *whether or not an activity in a given case is a strike is a question of fact on the evidence submitted in the particular case*.

Applying that statute here, virtually none of the prescribed concomitants of a strike (i.e. factual elements) were present. The employees were never "still out"; there was never any picketing; the union, instead of publishing the existence of a strike, was publicly declaring

that the procedure did not constitute a strike; no one was being prevented from accepting employment at the plant and no strike benefits were being paid.

The Petitioners argue that the duration of the withdrawals is not the test of whether an activity constitutes a strike. We agree. We emphatically insist, however, that the authorities establish that the question of the *intent* is one of the fundamental *facts* which determines whether a work stoppage is or is not a strike.

The public declaration of the persons who devised this technique that the stoppages were not strikes, is the clearest evidence of what the intent was;—namely *not to strike*.

Several varying and contradictory statements of the intent of the employees were given.

(1) The stoppages were said to be “spontaneous” and without assigned purpose.

(2) The intent was stated to be merely to attend “union meetings”—the causing of injury to the employer was merely an incident.

(3) The intent testified to was to interfere with production and inflict economic loss and injury on the employer and eliminate the possibility of the employer protecting himself.

(4) Finally the last intent, *advanced for the first time after the hearing before the Board*, was that the intent was to “strike”.

Not only is it true that *intention* is one of the vital elements in determining whether a given activity constitutes a strike, but, as we have seen, whether a given intention did or did not exist *is a question of fact*.

The Wisconsin Board had before it the Union's repeated assertions that the walkouts were not *intended* as strikes and did not constitute strikes and were with the intent of preserving to employees, rights which could not be preserved if the stoppages actually were strikes, and that the *intent* was to impose upon the employer a prolonged series of intermittent stoppages of production which would come without advance notice, could not be planned for, and which would exert a crippling effect on all efforts for planned operation of the business.

Bearing on this intent, the Board also had before it the fact that there had been no advance secret ballot for a strike as required by the Wisconsin Act or by the Smith-Connally Act which was evidence of no small significance on the issue of whether a strike was intended. Furthermore, there was before the Board the earlier conflicting assertions of the Union that the purpose of the stoppages were in no wise intended to interfere with production, but merely to allow the employees to attend bona fide Union meetings, which assertions were later repudiated by the Union.

On the other hand there was before the Board virtually nothing except the *arguments* of the Union's counsel that the stoppages did constitute strikes. That latter assertion would hardly be legally sufficient as evidence to raise an issue of fact as to the intent animating the work stoppages. While it is doubtful that the record before the court disclosed any evidence which could be considered substantial enough to support a finding that the intent was to strike, even if we assume, for the purpose of argument, that the record reflects some evidence that the intent was to strike, *the Board found to the contrary*. Such finding would seem to be conclusive on the courts and all

the Justices of the Wisconsin Supreme Court adopted the same view of the factual aspects of the procedure and agreed that it was not a strike (R. 122).

It is recognized that findings of a state tribunal do not foreclose the United States Supreme Court from examining the facts to see whether a finding is without substantial support in determining whether a federal right has been denied, *Truax v. Corrigan*, 257 U.S. 312, 66 L. Ed. 254, 42 Sup. Ct. Rep. 124 (1921). This is for the purpose of assuring that federal rights be not defeated "by insubstantial findings of fact screening reality". But when the findings of the State Court rest on substantial, or as here, virtually undisputed evidence, and have been authenticated by the highest Court of the State, those findings are regarded by the United States Supreme Court as conclusive, *Milkdrivers Union v. Meadowmoor Dairies*, 312 U.S. 287, 85 L. Ed. 836 at 841, 61 Sup. Ct. 552 (1941).

These repeated maneuvers called with the intent on the part of the Petitioners and the employees that they should *not* be, in fact, strikes,—called with the positive intent of preserving to the employees benefits not thought to be preservable in a strike,—called with the affirmative intent of inflicting severe damage (different and less susceptible to mitigation than the damage resulting from a strike); —called without in any instance being conditioned upon accession to any specific or general bargaining demand, —called, when the leadership, so desired, for purposes wholly unrelated to bargaining demands (such as to combat rumors),—and called without taking the vote by secret ballot in any instance as required as a condition precedent to a strike under the Wisconsin Statutes, all lack in important factual respects vital elements of the concept of a strike whether tested by traditional legal

concepts or by popular understanding or by the sense in which the term "strike" is used in the Wisconsin Statutes.

The subsequent pretext on the part of the Petitioners, urged for the first time after the hearing before the Board that these production stoppages were intended as or constituted strikes is contrary to the facts as found by the Board and by the Wisconsin Supreme Court on virtually undisputed evidence.

4. The Purpose of the Procedure Was to Control the Means of Production and to Fix the Working Conditions by Means Other than a Strike.

The purpose of this "new tactic" was plainly to create the effect and obtain the result of the sit down strike, so vigorously denounced by this Court in *National Labor Relations Board v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 83 L. Ed. 627, 59 Sup. Ct. 490 (1939), and yet to avoid, if possible, its exact features in the hope of circumventing the universal criticism of that plan.

The Wisconsin Act, passed in 1939, was drafted in the light of the experience of the late thirties, which included the development of the sit down strike and the slowdown and a period of widespread and bitter strikes. While the legislature could not foresee all of the new "weapons" which might be devised, it plainly anticipated that there might be variations of the sit down, slow down or other equally unwholesome activities aimed at controlling the means of production. The legislature therefore adopted the phrase "concerted interferences with production" to apply to such actions, and banned them, while expressly excepting from such ban, the strike as then generally recognized.

The Union's argument ignores the most fundamental and elementary rules of the employer-employee relationship since its position is that the employees may themselves start work or stop work at will without regard to the employer's wishes or direction and that the employer is helpless to control such action by the employees.

"Among the fundamental duties of the employee is the obligation to yield obedience to all reasonable rules, orders, and instructions of the employer * * *"
35 Am. Jur. 478.

"* * * the really essential element of the (employer-employee) relationship is the right of control * * * The test of the employer-employee relation is the right of the employer to exercise control of the details and method of performing the work."
35 Am. Jur. 445-6 (our parenthetical insert)

When an individual accepts the status of an employee, in consideration of certain benefits that accrue to him, he likewise assumes certain obligations and responsibilities and he necessarily relinquishes and waives certain rights which he would otherwise have. By his implied contract of employment, he agrees to work such reasonable hours as are fixed by the employer. To put it conversely, he agrees that *while the status exists*, he will not fail to work those hours (excepting in the event of generally recognizable excuses such as illness, impossibility and the like). A further exception to his agreement not to fail to work is his right (unless waived by express contract) to strike:—that is to fail to work because of participation in a concerted withholding of work with others until some legitimate demands have been obtained or settled—a procedure having well developed characteristics and commonly recognizable features.

In a true strike the employees stay away from work, they advertise the existence of a strike, they try to persuade others to join them, they picket, they meticulously eschew the performance of any work whatever for the employer. The employer's plant and facilities remain unoccupied and he is at liberty to try to find new employees or to close down his shop.

Here the employees seek to repudiate all the fundamental characteristics of the relationship by asserting the *right* to do none of the things which characterize a strike and claiming the right to fix the hours of work, to maintain control over the tools of production, to force the employer to have idle machines for intermittent periods, to prevent others from working in their places, and yet asserting that the relationship remains intact.

The Union leaders publicly asserted (and Petitioners' brief asserts) that the National Labor Relations Act protected this situation (R. 88) and the leaders threatened that if the employer sought to protect itself or to discipline the employees, it would be guilty of unfair labor practices under the provisions of that act guaranteeing certain concerted activities. No such perversion of the beneficial purposes of that Act should be countenanced.

Wisconsin recognized the elementary principles involved. It seeks to require employees to abide by their contract of employment, to discourage breaches thereof and to increase the likelihood of continued production while the employee-employer status exists, for the protection and welfare of all segments of its public including employees and employers.

The Wisconsin Act carefully preserves to the employees the right to endeavor to enforce employers to accede to demands by what everyone understands to be

a strike, the concerted refusing to continue work until the controversy has been resolved and the Union's strained argument as to involuntary servitude is just sheer nonsense. Despite Petitioners' attempt to torture the decision below into the imposition of "involuntary servitude"; it is clear that the employees are perfectly free to withhold their services. They have only been directed not to interfere with production by the specific conduct here adopted, but they are free to leave the premises and go on strike if they so choose. This is such a far cry from any conception of involuntary servitude as to make the claim in that regard ridiculous. For the preservation of the interests of all its citizens, Wisconsin has said that employees, while still insisting on the right to work as employees, shall not engage in sitdowns, secondary boycotts, slowdowns *or other concerted efforts to interfere with production* except strikes. Wisconsin placed a reasonable limit on the chaos and confusion which it will permit in the efforts of its citizens to produce goods.

The Union's brief glosses over the grave practical public policy involved which is of vital interest to the welfare of employees, employers and the public alike. *If this device were actually given legal sanction, a long step toward usurpation of management by the Unions would be taken.*

The Union leader testified he had requests from 350 unions to see how the new tactic works (R. 179), implying that if the procedure "stood up" the tactic would be widely used.

Despite the Union leaders' threat of unfair labor practice charges against the employer made before the hearing, the Union's brief hints (P. 44) that the employer might protect himself or retaliate by imposing discipline.

This is diametrically opposed to its position that this is a protected strike and this inconsistent stand amounts to an inadvertent concession that the activity is not a strike and Petitioners' whole argument thereby falls. The Wisconsin Board expressly said discipline could have been imposed (R. 21), and in the dissenting opinion of the Wisconsin Supreme Court it is said, "Since the activity was not a strike, I conclude that it is not a protected union activity. It was a breach of shop discipline and an invasion of employer's rights for which the employer may visit upon the participants the penalty of discharge or lesser discipline without committing an unfair labor practice" (R. 125). If that is true, the activity is not protected by the federal law.

Be that as it may, to force an employer to the drastic step of discharge or disciplinary layoff to some two thousand people, (virtually the entire working force) in an effort to obtain compliance with the simplest elements implied by the employment relationship would seem to level a severe blow to industrial peace and that is a situation the Wisconsin legislature has wisely sought to head-off or make less likely to occur.

But aside from the impracticability of such a step in the light of industrial realities, the Union leaders by the very decision they ask here, seek a complete grip on the tools, place and means of production through legalizing its tactics and thus holding over the employer the threat that if the employer does impose discipline, he may be guilty of unfair labor practice charges on the ground that such discipline constitutes an illegal lockout or an interference with the employers "right" to engage in this kind of concerted activity (R. 88).

In other words, it would seem that if the Union's position were sound, the employer could do nothing, and

the employees could do anything, short of actual breach of the peace, no matter how obnoxious or detrimental to the public welfare, so long as it could be considered "concerted action" for "mutual aid".

Such a conception of the rights and duties of employees destroys the essential basis of the employer-employee relationship. The Union bases its brief on the fundamentally fallacious assumption that the indulgence in any type of concerted activity which a Union feels will be of benefit is a right guaranteed by the Constitution and that the Constitution and federal law give employees the *right* to try to enforce *any* demand by *any* type of "economic pressure" they can devise.

The ingenious beclouding of the real issue and the sophistry employed in the Petitioners' brief reaches a climax with the argument on page 45 to the effect that the employees are not seeking to fix the hours or days on which they will work, but that they are merely insisting on "the right not to work";—that is, they seek to fix the hours or days they will *not* work regardless of the implied terms of their contract of employment.

The Wisconsin Board properly found as a fact that here was not an attempt to strike; here, in fact, was a concerted effort to interfere with production by means other than a strike, and by a means which carried to its logical conclusion could lodge complete control of the means and time of production in the Union.

5. The Factual Situation Shows that there Is No Impairment of any Federally Guaranteed Right.

In the last analysis, the facts in a given case are controlling, in determining whether any right specifically

protected either by the Federal Constitution or Federal law has been impaired.

No Federal law guarantees to Union leaders, with immunity from reasonable state control, the right, repeatedly and completely, to stop an employer's operations by calling out the employees at frequent short intervals during a regular work shift, ostensibly to attend union meetings, but in such a way as to disrupt production, inflict severe damage and yet retain control of the jobs.

As we have seen, at the time these production stoppages were conceived, and during the period they were being put in practice, they were never characterized as strikes and claim of justification under a right to strike was never asserted. Justification is claimed on the ground that under the National Labor Relations Act the employees were entitled to engage in concerted activities for their mutual protection (R. 88).

This claim of right, as applied to the facts of the instant case, then must rest squarely on the proposition that that Federal Statute provides that union officials may stop plant operations at any time and as frequently as they may choose by calling out the employees during regularly scheduled working hours with the asserted purpose of attending union meetings or to discuss any matters that might come within the possible compass of mutual aid or protection and yet retain the absolute right of these same employees to return to work when they choose and, therefore, the states are helpless to curb or limit such procedure.

We have already pointed out that by the very acceptance of employment an employee agrees (with certain legally recognized exceptions) to devote certain hours

designated by the employer to that employment. He reserves other hours during which he is free to follow his own pursuits, including concerting with fellow employees on matters relating to their mutual aid and protection or anything else. While collective bargaining contracts, by mutual agreement, may permit certain union officials (stewards or committeemen) to carry on various union activities such as settling grievances, collecting dues or negotiating during working hours, it is inconceivable that any such conduct can be lawfully applied unilaterally by employees en masse or that a state may not place reasonable limitations on such activity.

To say that a Federal law guarantees the right of employees during regular working hours, to walk out en masse at frequent, unannounced and repeated times for the assigned purpose of attending union meetings and yet retain an unquestioned right to return to work whenever they desire, and that the employer is bound to tolerate such conditions and keep the facilities available at all times for such employees, is to say that the Federal Statutes have destroyed the employer's right to operate his business on regular scheduled shifts or hours and that such statutes have delivered to the employees or union officials the right to determine and control, without any bargaining with, or any agreement from the employer, the regular hours, shifts and days during which the business shall operate. Heretofore these matters have been recognized necessarily and unquestionably, to be within the control of management, and they must be so left if a business is to be allowed to function, subject only to limitation by collective bargaining. If the proposition contended for by Petitioners is accepted, collective bargaining is non-essential.

"If they (the employees) had the right to fix the hours of their employment it would follow that a similar right existed by which they could prescribe all conditions and regulations affecting their employment." *C. G. Conn Limited v. National Labor Relations Board* (8th C.C.A.) 108 Fed. 2d 390 at 397; (1939) (our parenthetical insert)

Such a warped construction of the Federal Statute could not but defeat the most beneficial purposes of that statute since such widesweeping impairment of the managerial function of our form of economy could well lead to much industrial chaos with most detrimental repercussions to jobs. The control and proper regulation of a situation such as this has not been denied to the states by Federal law. The Wisconsin Act is a proper state enactment in the interests of sound public policy and in essence is for the protection of the employees themselves to avoid the unwholesome results which would flow from the acquisition of such dictatorial power on the part of irresponsible union leaders.

The argument that since the employer may not suffer as much from the tactics used here as he would by a genuine strike, the tactic should not be controlled, is not tenable. The same might be said for the sitdown or the slowdown which by their very nature could not last over the period of months involved here, but which have, nevertheless, been condemned by the courts. Those are labor tactics which are now admittedly improper and unlawful though having most of the elements which Petitioners say go to make up a strike.

As has been emphasized, the right of employees to quit the employment or to strike as a means of bringing economic pressure upon the employer to agree to bargaining demands in respect of terms of the employment, is

not questioned nor impaired by the Wisconsin law nor the decision below in this case. Nor is the right to hold union meetings at any proper time and place. On the other hand, the right to hold meetings, or to determine the place of meetings, or the times of the meetings are not guaranteed by any law as being unqualified rights which employees may use for the implicit purpose of coercing an employer and controlling the means of production. Nor are they guaranteed to the employees as rights per se no matter how they are to be exercised.

The right to hold meetings, union or otherwise, by employees or any other group is a general right whether considered as the right of free assembly and free speech or as incident to the collective aspects of the employment. That right does not derive from or rest on any idea of its being designed to be coercive upon or to be exercised against or adversely to the interests of an employer or anyone else, and it, like all rights, is subject to reasonable control where used for unlawful ends or where its exercise infringes on co-relative rights of others.

Suppose, the union calls a meeting, not only during regular first shift hours of work, but at the employer's plant, and the second shift employees come into the plant and the first shift employees leave work, at whatever hour they choose, and assemble, at whatever point they choose, in the employer's plant, and consider, as long as they choose, any matters they choose. Suppose this is done repeatedly over a period of months, with the admitted purpose of stopping the plant operations in order to inflict damage upon the employer's business.

It is obvious that whatever concept obtains as to the right of employees to meet or to act in concert for mutual aid and protection, or for any other reason, that "right"

would be perverted and unlawful when so exercised. The mere fact that the meetings were conducted off the premises while the employees still retained such control of the plant and machinery that no one else could use them, does not alter the principle involved. The perversion of the "right" results from the method of exercising it; that is, so as to override and destroy the terms of the employment, the rights of the employer to use his property and the right of others to work at such place of employment, — a method which the State has properly said is not lawful.

In any employment relationship it is necessarily implied that the employees may not repeatedly and without prior notice, during working hours, use their unquestioned right to meet so as to turn the primary function of operation of the business, (which is the production of goods) into a diametrically opposite result, namely, wrecking the operation of the business.

This is as true of employees leaving their work repeatedly during regular work hours, as of employees (whether or not scheduled to work during those hours) who would try to call and hold a meeting in the plant thus stopping the normal plant operation. Either way there is brought about an abuse of the normal purposes and processes of the right of individuals to meet. Either way there is the overriding and destruction, by the perversion of that right, of the fundamental purpose of the employment relation, namely, the production of goods.

Employees who desire in concert to try to stop their employer's production of goods have been told in Wisconsin that they may do so but they have been limited to doing it by a lawfully conducted strike in the generally accepted meaning of the term. In that mild restriction

and proper-exercise of the state's police power no federal or constitutional right has been impaired in the slightest degree.

These employees do not have to work for this employer five minutes if they do not wish to; they can strike and they can assemble and they can talk. They may not exercise those lawful *rights* by the unlawful conduct here adopted nor protect them under the asserted guise of "strikes".

C. THE ATTACKED SECTION OF THE WISCONSIN ACT RELATES TO A SUBJECT NOT PRE-EMPTED BY FEDERAL LAW AND IS A REASONABLE AND WHOLESOME EXERCISE OF THE STATE'S POLICE POWER

The Wisconsin Attorney General's brief makes it clear that the factual situation here does not relate to a subject pre-empted by federal legislation and hence it would seem to be self-evident that the state's police power was not improperly exercised in establishing the reasonable regulation of employee conduct here so hysterically denounced.

The validity of that regulation is not tested solely by the language of the Act nor the language of the Board's order, nor as applied to any general factual assumptions. The test is to be applied on the basis of *the specific facts of the instant situation* and treating the Board's desist order as commanding nothing more than that the Petitioners desist from causing repetition of the same type of production interferences. The Wisconsin Supreme Court, determined, as a matter of Wisconsin law, that the limited effect of the Wisconsin Board's order was "to ban the individual defendants and the members of the

union from engaging in concerted effort to interfere with production by doing the acts *instantly involved*" (R. 116, our emphasis).

Petitioner's rights, whatever they may be, are not restricted beyond what the Wisconsin Supreme Court has determined is the meaning and effect of the desist order. Hence, we confine ourselves to consideration of the desist order and its sanction, as so limited,—to prohibiting repetition of the pattern of production stoppages found in the facts in the instant case.

Regulation of matters growing out of the employer-employee relationship has long been a prolific source of exercise of state police power. Workmen's compensation acts, unemployment compensation acts, laws regulating hours of employment, conditions of employment, minimum wages and matters of safety, are but a few instances of such legislation. These enactments are grounded primarily upon a policy which looks to the general public welfare of the community and only secondarily to the specific interests of either employee or employer.

It is of prime public interest and welfare that (aside from the result of a lawful strike) the tools and means of producing goods be not arbitrarily, improperly or unreasonably obstructed and production halted, with the entailing economic waste, and damage to employees, employers and the rest of the public alike. In an earlier day, with small units of production, the absence of specialization or of division of labor and machine tools, a "stoppage of production" might be limited to what that statement implies without any radiating effects upon buying, delivering, storing, preparing the raw materials, scheduling the production for months ahead to conform to a pattern of purchasers' orders, packaging, shipping

and delivering the finished products in a required time sequence. In the present day, however, in plants such as those of the Company, all of those elements are involved, and their co-ordination, integration and timing sequence are absolute essentials to the production of goods in the manufacturing operations.

It was this very element (a planned, timed, co-ordinated, integrated sequence of varying events and operations) that Petitioner Doria rightly recognized to be the Achilles heel of production and which would be at the mercy of interferences, staged during regular work hours, without advance notice, and repeated at such intervals as the Petitioners might choose.

The stoppages produced the intended effect,—complete confusion and disruption, inability to fill purchasers' orders, inability to co-ordinate the handling of materials, inability to integrate deliveries with production and orders and thus, as Petitioner Doria predicted, inflicting greater damage on the business than could have been inflicted by strike.

It is manifestly vital to the public welfare of the State of Wisconsin that such a condition be controlled within reasonable limits. It is difficult to conceive a more appropriate instance for the exercise of reasonable state regulation. To fulfill its duty to the citizens of Wisconsin, the state has not resorted to a penal law. Instead it has preserved to employees their full right to strike with its usual incidents. It has provided a flexible administrative remedy by which, after a hearing before an impartial state board, an admonition is directed to the employees not thus unlawfully to continue such production interferences. There is adequate provision for judicial review. To deny that, in such a situation, Wisconsin

or any other state does not have the police power to cope with this unique but effective method of seizure and control of the means of production, is to say that the public is at the mercy of the Petitioners in the instant case who may with impunity continue to exercise unilateral and dictatorial power over the extent to which the community's tools of production may be used or interfered with.

It was to avoid, if possible, (but with the exception resulting from a legal strike), stoppages of production and the throwing of large numbers of persons out of work, that the clause of the Wisconsin Act in question was enacted. The Act sought to limit within reasonable bounds, tactics of this type on the part of the employees, as well as unfair tactics on the part of the employers, all in the interests of promoting true collective bargaining, industrial peace and uninterrupted production and employment.

The issue is not whether the Union or a court might think that this particular activity is less "harmful" than a strike or not the best way of promoting labor peace or "ought to be encouraged" for reasons urged by the Union at pages 76 and 77 of its brief. What governs is whether this legislation, which seeks by reasonable means, to reduce or limit the type of weapons to be used in economic warfare, actually deprives any person of any *right* which the Constitution says he shall have. Since it does not appear clearly or even possibly that the Constitution or valid federal legislation forbids this type of law, the court will not substitute its judgment for that of the legislature as to what is the best way to protect the public welfare.

We refrain from argument of further points to avoid undue duplication with the Wisconsin Attorney General's brief.

D. CONCLUSION

The Wisconsin Board has found as a fact, on substantial evidence, that no strike was called and that the employees did not engage in a strike in the tactic pursued. That finding has been authenticated by all of the justices of the Supreme Court of the State of Wisconsin.

Analysis of the facts establishes that the Union leaders deliberately adopted a skillful plan to control the means of production and to dictate the terms of employment without engaging in a strike. That conduct has been subjected to reasonable regulation by the State of Wisconsin without depriving the Petitioners or the employees of any constitutional or federal rights whatever.

This court, regardless of what might be its own views, as to the best means of protecting the public in industrial strife, will not substitute its judgment for that of the people of Wisconsin, acting through their legislature, where constitutional or federal rights are not impaired, nor will it lightly strike down reasonable safeguards set up by a State for the protection and welfare of all its citizens.

In the absence of clear proof that guaranteed constitutional or federal rights have been denied, the court will not nullify the sovereign will of the people.

The facts found by the Board on virtually undisputed evidence, establish completely that as applied to the tactics engaged in, the Petitioners have been deprived of no right except the "right" to attempt to take over control of industry by the particular means adopted.

The decision below should be affirmed.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1948

Nos. 14 and 15

INTERNATIONAL UNION, UNITED AUTOMOBILE
WORKERS OF AMERICA, A. F. of L., LOCAL
232; ANTHONY DORIA, CLIFFORD MATCHEY,
WALTER BERGER, ERWIN FLEISCHER, JOHN
M. CORBETT, OLIVER DOSTALER, CLARENCE
EHRMANN, HERBERT JACOBSEN, LOUIS
LASS,

Petitioners,

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD,
L. E. GOODING, HENRY RULE and J. E. FITZ-
GIBBON, as Members of the Wisconsin Employ-
ment Relations Board; and BRIGGS & STRATTON
CORPORATION, a Corporation,

Respondents.

Brief of Wisconsin Employment Relations Board

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i

INDEX

	PAGE
OPINION OF THE COURT BELOW	1
STATEMENT AS TO JURISDICTION	2
A. Federal Statutes Involved	2
B. Issues Presented	3
FACTS	5
SUMMARY OF ARGUMENT	11
I. CONGRESS DID NOT INTEND BY THE NATIONAL LABOR RELATIONS ACT OR THE LABOR-MANAGEMENT RELATIONS ACT, 1947, TO PRECLUDE ALL REGULATION OF LABOR RELATIONS BY STATES	11
II. THE STATE ACTION IS IN FURTHERANCE OF FEDERAL POLICY RATHER THAN IN CONFLICT WITH IT	12
III. THE STATE ACTION DOES NOT IMPOSE INVOLUNTARY SERVITUDE, NOR DENY FREEDOM OF SPEECH OR ASSEMBLY	13
IV. THE PROVISION OF THE STATE LAW RELATING TO STRIKE VOTES IS NOT INVOLVED IN THIS CASE	13
ARGUMENT	14

I. THE ORDER OF THE STATE BOARD DOES NOT VIOLATE ART. I, SEC. 8 OF THE CONSTITUTION CONFERRING UPON CONGRESS THE POWER TO REGULATE COMMERCE AMONG THE STATES	14
A. Congress has not Pre-empted the Entire Field of Labor Relations so as to Prohibit the Type of State Action Involved in this Case	17
B. The Order of State Board does not Deprive the Petitioners of any Right Guaranteed to them by Congressional Enactment	25
(1) The restrained tactics are not protected by sec. 7 of the National Labor Relations Act, nor the corresponding provisions of the Labor-Management Relations Act, 1947	25
(2) The restrained tactics are not protected by sec. 13 of the National Labor Relations Act nor by the corresponding provisions of the Labor-Management Relations Act, 1947	40
II. THE RESTRAINT IMPOSED BY THE WISCONSIN BOARD DOES NOT DENY PETITIONERS ANY RIGHTS GUARANTEED BY THE 13th AND 14th AMENDMENTS TO THE CONSTITUTION	42
III. SEC. 111.06 (2) (c) OF THE WISCONSIN STATUTES IS NOT INVOLVED IN THIS PROCEEDING. EVEN IF IT WERE, IT IS NOT UNCONSTITUTIONAL AS CONSTRUED BY THE STATE COURT	55
CONCLUSION	58

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	PAGE
Allen-Bradley Co. v. Local Union No. 3, (1945) 325 U. S. 797, 65 S. Ct. 1533, 89 L. ed. 1939	50
Allen-Bradley Local 1111 v. Wisconsin E. R. Board, (1941) 237 Wis. 164, 295 N. W. 791, affirmed 315 U. S. 740, 62 S. Ct. 820, 86 L. ed. 1154 (1942)	15, 24, 27, 39, 55
Amalgamated Utility Workers v. Consol. Edison Co., (1940) 309 U. S. 261, 84 L. ed. 738, 60 S. Ct. 561	17, 27
Arthur v. Oakes, (1894) 63 Fed. 310, 25 L. R. A. 414	49
Bethlehem Steel Co. v. New York Labor Rel. Bd., (1947) 330 U. S. 467, 67 S. Ct. 1026, 91 L. ed. 1234	20-21, 22, 23
Carter v. Carter Coal Co., (1935) 298 U. S. 238, 56 S. Ct. 855, 80 L. ed. 1160	19
Christoffel v. Wis. E. R. Board, (1943) 320 U. S. 776, 88 L. ed. 466, 54 S. Ct. 90	39
Conn, C. G., Limited v. National Labor Relations Board, (1939) 108 F. 2d 390	31-32, 33
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Dorchy v. Kansas, (1926) 272 U. S. 306, 47 S. Ct. 86, 71 L. ed. 248	45

	PAGE
Fontaine Converting Works, Inc., 22 LRRM 1149, 77 NLRB #216	30
France Packing Co. v. Dailey, (C. C. A. 1948) 166 F. 2d 751	44-45
Harnischfeger Corporation, 9 N. L. R. B. 676	30-31
Hill v. State of Florida, (1945) 325 U. S. 538, 65 S. Ct. 1373, 89 L. ed. 1782	25, 26
Hotel & R. E. I. Alliance v. Wis. E. R. Board, (1942) 315 U. S. 437, 86 L. ed. 946, 62 S. Ct. 706	27-28, 39, 42, 54, 56
Howat v. Kansas, (1922) 258 U. S. 181, 66 L. ed. 550, 42 S. Ct. 277	46
In the Matter of the Petition of International Union, United Automobile, Aircraft and Agricultural Im- plement Workers of America, C. I. O. for Deter- mination of Bargaining Representatives for Em- ployes of Kearney & Trecker Corporation, Case II, No. 1994 E-725, Decision No. 1636	15
In the Matter of the Petition of United Steel Workers of America, C. I. O. for Determination of Bargain- ing Representatives for Employes of Crown Can Company, Case I, No. 2195, E-769, Decision No. 1738-A, 22 L. R. R. M. 1369	16
International Longshoremen's Union, 22 LRRM 1001, October 25, 1948	30

	PAGE
National Labor Relations Board v. Draper Corporation, (1944) 145 F. 2d 199	29
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National L. R. Board v. Indiana & Michigan Elec. Co., (1943) 318 U. S. 9, 63 S. Ct. 394, 87 L. ed. 579	18
National Labor Relations Bd. v. Sands Mfg. Co., (1939) 306 U. S. 332, 83 L. ed. 682, 59 S. Ct. 508	28
National Labor Relations Bd. v. Virginia Electric & P. Co., (1941) 314 U. S. 469, 86 L. ed. 348, 62 S. Ct. 344	34
Schechter, A. L. A., Poultry Corporation v. United States, (1935) 295 U. S. 495, 55 S. Ct. 837, 79 L. ed. 1570, 97 A. L. R. 947	19
Southern S. S. Co. v. National Labor Relations Board, (1942) 316 U. S. 31, 62 S. Ct. 886, 86 L. ed. 1246	30
Sta-Kleen Bakery, Inc., 78 N. L. R. B. 94, 22 L. R. R. M. 1257	18
State ex rel. Hopkins v. Howat, (1921) 109 Kan. 376, 25 A. L. R. 1210, 198 Pac. 686	46
United States v. United Mine Workers of America; (1947) 330 U. S. 258, 91 L. ed. 884, 67 S. Ct. 677	46

Western Union Tel. Co. v. International B. of E. Workers, (1924) 2 F. 2d 993, affirmed 4th C. C. A., 6 F. 2d 644, 46 A. L. R. 1538, certiorari denied 284 U. S. 630, 76 L. ed. 536, 52 S. Ct. 13	46-47
Wolff, Chas., Packing Co. v. Court of Industrial Relations, (1923) 262 U. S. 522, 43 S. Ct. 630, 67 L. ed. 1103; (1925) 267 U. S. 552, 45 S. Ct. 441, 69 L. ed. 785	45-46

STATUTES INVOLVED

Federal Statutes

Judicial Code, sec. 237 (b)	
43 Stat. 937 (Feb. 13, 1925, c. 229 sec. 1) 28 U. S. C. A. sec. 344 (b)	2
Labor-Management Relations Act, 1947	
61 Stat. pp. 36-161	
29 U. S. C. A. Supp. secs. 141-197	
2, 17, 18, 22, 25, 26, 35-36, 37, 40, 41	
National Labor Relations Act	
49 Stat. 449-457	
29 U. S. C. A. secs. 151-166	
2, 17, 26, 27, 28, 30, 40	

Wisconsin Statutes, 1947

PAGE

Sec. 103.53	57
111.01-111.19	39
111.01 (1)	58
111.01 (4)	38
111.06 (2) (e)	13, 55

CONSTITUTIONAL PROVISIONS

United States Constitution

Art. I, sec. 8	14
----------------------	----

TEXTS

Teller, Labor Disputes and Collective Bargaining, Vol.

1, sec. 14, pp. 34-39	50-51
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Supreme Court of the United States

October Term, 1948

Nos. 14 and 15

INTERNATIONAL UNION, UNITED AUTOMOBILE
WORKERS OF AMERICA, A. F. of L., LOCAL
232; ANTHONY DORIA, CLIFFORD MATCHEY,
WALTER BERGER, ERWIN FLEISCHER, JOHN
M. CORBETT, OLIVER DOSTALER, CLARENCE
EHRMANN, HERBERT JACOBSEN, LOUIS
LASS,

Petitioners,

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD,
L. E. GOODING, HENRY RULE and J. E. FITZ-
GIBBON, as Members of the Wisconsin Employ-
ment Relations Board; and BRIGGS & STRATTON
CORPORATION, a Corporation,

Respondents.

Brief of Wisconsin Employment Relations Board.

OPINION OF THE COURT BELOW

The opinion of the Supreme Court of Wisconsin is reported in 250 Wis. 550, 27 N. W. 2d 875, and appears at pages 106-121 of the printed record. Judgment has been entered in the Circuit Court for Milwaukee County pursuant to such opinion.

STATEMENT AS TO JURISDICTION

A. Federal Statutes Involved

Jurisdiction has been invoked by the petitioners under sec. 237 (b) of the Judicial Code, 43 Stat. 937 (Feb. 13, 1925, c. 229 sec. 1), 28 U. S. C. A. sec. 344 (b) on the ground that the order of the Wisconsin Employment Relations Board, which was affirmed and enforced by the decision of the State Supreme Court, was issued pursuant to a state statute infringing upon a domain occupied by Congress under its power to regulate commerce, and depriving petitioners of rights guaranteed to them by Congressional legislation and by the Constitution of the United States.

The order of the state board and the decision of the State Supreme Court were issued prior to the enactment of the Labor-Management Relations Act, 1947, 61 Stat. pp. 36-161, 29 U. S. C. A., secs. 141-197 (Taft-Hartley Act). Such federal questions as were raised in the state courts were accordingly decided with reference to the federal legislation then in effect, i.e., the National Labor Relations Act, 49 Stat. 449-457, 29 U. S. C. A. (1945) secs. 151-166. (Wagner Act).

Since the effect of the judgment entered in the state court is continuing, the questions respecting its present validity and effectiveness would be based upon the federal legislation now existing rather than upon that which existed at the time the action was taken.

The orders allowing certiorari constitute, we assume, a determination that federal questions are presented. Since the questions are to be considered, it is the hope of this respondent that they can be resolved on the basis of cur-

rent federal legislation so as to provide the greatest possible guidance for future action.

B. Issues Presented

The petitioners' "Statement as to Jurisdiction" contains a purported summary of the federal questions decided by the state court, which does not seem to us to be an accurate frame-work for the deliberations of this court. Both argument and deliberation will be simplified by an exact definition of the questions to be considered. It is our belief that the questions to be determined, stated as concisely as possible, are:

1. Does an order of a state board violate the commerce clause of the constitution by denying to the petitioners the use of a new coercive tactic designed by them to interfere with production, through the device of inducing employees to engage in a concerted program of repeated absences, of a few hours duration, during scheduled working hours?

2. Does such an order violate constitutional provisions relating to involuntary servitude, freedom of assembly, and freedom of speech?

A mere quotation of the state board's order is insufficient to frame the issues because the order has been restricted by interpretation of the Supreme Court of Wisconsin. That court interpreted the words of the order by saying that what it does, "and all that it does is to ban the individual defendants and the members of the union from engaging in concerted effort to interfere with production by doing the acts instantly involved" (R. 113). The peti-

tioners urged before the Wisconsin court that the order was unconstitutional because it purported to ban certain conduct such as the quitting of work for the purpose of going to work elsewhere, but the court said that "the order has no such far-reaching effect either upon individuals or upon employees acting in concert." Since the only thing prohibited by the order as interpreted by the Wisconsin court is the conduct in which the petitioners were found to have engaged, that conduct must be characterized in presenting an issue involving the validity of the state board's order.

The petitioners have attempted to describe the purport of the state action at several points in their brief, as in the specification of errors, by saying that it prohibits "engaging in peaceful work stoppages." In the first place, the portion of the order challenged (as distinct from the other portion of the order, which was based on threats and damage to property) is aimed at instigation and is not directed against mere participation. Further, the description of the tactic contained in the specification of errors omits the objectionable elements which called forth the proscription.

In the first part of the state court's opinion (R. 109), it merely quoted and reiterated the board's order; and in the later portion restricted the effect of the order by interpretation (R. 113, 115-116):

The assertion that the forbidden tactics are "not associated with any violence" is not strictly accurate, since the unchallenged part of the state board's order (and the only part banning mere individual participation) was based on threats and property damage. It is conceded, however, that the association with violence was incidental, and it is urged

that such a background is unnecessary to sustain the validity of the challenged portion of the order.

FACTS

The Briggs and Stratton Corporation (hereinafter referred to as the company or the employer) operates two manufacturing plants within the State of Wisconsin, and its employees work wholly within the boundaries of such state (R. 26). The International Union, U. A. A. W. A., A. F. of L., Local 232 (hereinafter referred to as Local 232) represents most of the company's production employees as their collective bargaining agent (R. 40-41). A contract between the employer and Local 232 expired July 1, 1944, and the parties undertook negotiations for a new agreement. At the time of the events to be described a new contract had not been signed (R. 34-35).

Among the matters upon which agreement had not been reached were the demands of Local 232 that members be required to maintain their membership as a condition of employment, and for check-off of dues (R. 35, 40, 47). No referendum had been conducted among the employees to approve a provision for maintenance of membership until more than four months after the inception of the program hereinafter described. Such a referendum is essential under the state law to the validity of a contract providing for compulsory unionism (R. 40). Neither had the conditions imposed by state law been met to authorize a check-off of dues.

With the bargaining process at such a stage, a meeting of Local 232 was held on November 3, 1945, at which time

the petitioners submitted to the membership a new method of pressure devised and recommended by Petitioner Doria. The proposed new plan had previously been discussed with officers of other labor organizations who "did not think it could be done" (R. 47).

The advantages of such new procedure were pointed out to the members (R. 47-48). Petitioner Doria, speaking for Local 232, publicly announced that the procedure "would avoid * * * the hardships which a strike imposes on the workers" and that it was deemed "a better weapon than a strike" (R. 87).

The plan of the petitioners called upon the employees to absent themselves from work repeatedly during scheduled working hours, for a few hours at a time, without giving advance notice to the company.

The plan as recommended was adopted. During the period from November 6, 1945 to March 22, 1946 the petitioners called upon the employees so to absent themselves 27 times (R. 36-37).

No reason was given to the employer for the absences until after several of them had occurred (R. 37, 48). After several of the absences, the employer was told that their purpose was to attend union meetings (R. 37). Some time later, the employer was told during bargaining negotiations that the absences were spontaneous on the part of the employees, and not the result of action by petitioners (R. 37). Even later, the petitioners told the employer that it could be "very instrumental in avoiding these meetings if they would quit starting rumors intended to undermine the union" (R. 49). The petitioners never informed the employer upon what specific demands the absences were

predicated nor what action would have to be taken by the employer to avoid them.

Not until the hearing before the state board on March 26, 1946, more than four months after the tactics were adopted, were the real purposes and objectives of the absences disclosed. The petitioners' representative, who devised the tactics, then admitted that the real purpose of the procedure was to interfere with production so as to exercise economic pressure upon the employer (R. 47, 49); and that the plan was "to be able to have such control" that when anything happened which was deemed detrimental, the petitioners "would be in a position to bring the members together to counteract" (R. 48). It was pointed out that "the so-called pressure in negotiations" was one important feature of the program (R. 49-50) and that the device was to be used upon "any development in direct negotiations with management," and " * * * any time the leaderships feel management has started a rumor detrimental to the union's security" (R. 87-88). It was one of the features of the plan not "to notify the company in advance" of any absence (R. 48).

One of the advantages asserted by the petitioners for this procedure over the strike is that "it keeps the worker on the payroll" (R. 87). Petitioner Doria asserted at the hearing that the work-time stoppage is "as old as the strike itself," but "the continued use of this is a new feature" (R. 47).

In addition to the advantages that "it keeps the worker on the payroll" and avoids "the hardships which a strike imposes upon the workers," the petitioners asserted that "a fourth advantage * * * is the fact that it puts the company completely on the defensive" (R. 88), and that:

"The meetings are called without warning, and take the company by surprise. They find it difficult to make commitments or plan production" (R. 88).

"This can't be said for the strike. After the initial surprise or walkout the company knows what to do and plans accordingly.* * *" (R. 88).

The employer took the position that production could not be continued unless it knew during what hours it might operate (R. 44).

In addition to the program of absences, the petitioners, without notifying the company, also directed workers not to report for work on Saturdays (R. 38-39) although the employer had issued notice that work was to be scheduled on Saturdays, at overtime pay (R. 38). After failing to report for a number of Saturdays, half the employees turned up one Saturday (R. 39), again without notice to the employer so as to enable it to have materials ready. Following that occurrence, the employer posted a notice which said that in view of the difficulty in scheduling work when there were unexpected stoppages, Saturday work would not be scheduled in any week in which there had been a work stoppage (R. 39).

Some employees were threatened with damage or injury if they did not join the petitioners' program of absences, and considerable damage was actually inflicted. Many employees who did not desire to take part in the program were induced to do so by booing, heckling and threats (R. 40, 50, 51, 53-54, 55, 56-58, 59, 60-61, 62-63, 64-65, 68-69, 70, 75).

In retrospect, the petitioners assert that the objectives of the proceedings were specific, but at no time during

the program were specific objectives communicated to the employer.

The petitioners have stated in their brief that one of the objectives of the program was to compel the employer to conform to a War Labor Board directive. The record establishes such a statement to be without base in fact, because the pressure program was commenced on November 3rd, while proceedings were *pending* before the War Labor Board, and no directive was served upon the employer until January 17, 1946, more than two months after the program had begun (R. 34). By that time the War Labor Board had been abolished by presidential order (Order 9672, 11 Fed. Reg. 221) so that AT NO TIME DURING THE CONCERTED ABSENCES HERE INVOLVED WAS A DIRECTIVE OF THE WAR LABOR BOARD IN EFFECT. When the directive finally reached the company, it included provisions for maintenance of membership and check-off (R. 43) which the employer could not validly have agreed to because they had not been validated as required by state law.*

The objective of the program used by Local 232 is not decisive of this proceeding, except that the several changes in position of the petitioners in that respect illustrate that one of the elements of the program is to avoid commitment as to the objectives sought and thus to prevent their evaluation. One of the important features of the program is that it does not commit the actors to a specific demand but

* (The Wisconsin Supreme Court recognized that a directive of the War Labor Board in time of war "supplants and operates to suspend state action in regard to the same subject matter." During the life of a War Labor Board directive, therefore, demands for maintenance of membership and check-off provisions in a contract pursuant to such a directive would have been recognized by this state as valid, irrespective of compliance with conditions imposed by state law; but after the War Labor Board's power was disestablished that was, of course, no longer true.)

leaves them free to shift from one objective to another without notice.

The state board found that the purpose of the petitioners was to compel the employer to accede to demands of the union, but it did not, and could not, have found *what* demands; because the position of the union was still shifting in that respect even at the time of the hearing several months after the program was undertaken. The tenor of the state board's finding is that it was the purpose of the union to exercise pressure upon the employer to agree to any demands that might be made in the course of collective bargaining either before, during, or after the program of concerted absences was commenced. The record shows that bargaining was continuing and that new demands were being made during the course of the program, and that some of the demands were being granted and put into effect during that period (R. 35, 41-42).

SUMMARY OF ARGUMENT

I.

CONGRESS DID NOT INTEND BY THE NATIONAL LABOR RELATIONS ACT OR THE LABOR-MANAGEMENT RELATIONS ACT, 1947, TO PRECLUDE ALL REGULATION OF LABOR RELATIONS BY STATES

A. The state board does not deny the power of Congress to regulate labor relations so as to pre-empt the field and exclude states. It contends only that Congress did not manifest an intent in either the National Labor Relations Act or the Labor-Management Relations Act, 1947, to preclude states from enacting supplementary regulations with respect to intrastate enterprises such as manufacturing, even though the operations of such enterprises are such as to warrant a finding by the National Board that an unfair practice would tend to obstruct commerce.

B. Congress has made different provision with respect to unfair practices occurring "in commerce," and those occurring in intrastate enterprise which are brought within the scope of federal regulation because they "affect" commerce. With respect to the latter type of practices, Congress has not made the federal legislation automatically applicable, but it applies in a particular case only if the National Labor Relations Board has found as a fact that the particular practice would tend to obstruct commerce.

C. Congress did not intend labor relations of intrastate enterprises to be immune from all regulation in cases in which the National Board is unable or unwilling to act.

D. Congress has legislated with respect to a limited

number of practices; it did not intend to preclude supplementary regulation by states as to other practices.

II.

THE STATE ACTION IS IN FURTHERANCE OF FEDERAL POLICY RATHER THAN IN CON- FLICT WITH IT

A. The type of coercive program which the state action prevents petitioners from instigating is not among the activities which Congress seeks to protect.

B. The activities of the petitioners were in derogation, rather than in furtherance, of the federal policy to encourage collective bargaining; because one of the elements of the program is to exercise coercion without specifying the objectives. This phase of the program enabled the petitioners to avoid responsibility for purposes which were not legitimate.

C. The program is a variation of the sit-down strike in that it seeks to prevent any use of the productive facilities. It seeks to accomplish the same degree of coercion, but to evade the classification of the sit-down strike. The activities did not involve even a temporary relinquishment of employment, but an assertion of the privilege to interrupt the work schedule at will without interrupting the continuity of the employment.

III.

THE STATE ACTION DOES NOT IMPOSE INVOLUNTARY SERVITUDE, NOR DENY FREEDOM OF SPEECH OR ASSEMBLY

A. The order of the state board does not prevent quitting work either singly or in a body. It does not forbid attendance at meetings. It prohibits only the inducement of a newly devised type of coercive tactic in which no single element is prohibited unless it occurs in combination with all the others to form the totality of the program actually followed.

B. The restrictions imposed by the constitution upon state power in this respect can be no greater than those imposed upon Congress by the first ten amendments. Congressional action imposing far broader restrictions than those here involved has been upheld.

IV.

THE PROVISION OF THE STATE LAW RELATING TO STRIKE VOTES IS NOT INVOLVED IN THIS CASE

The provisions of Sec. 111.06 (2) (e) of the Wisconsin statutes are not involved in this proceeding because no remedy was ordered for the failure to conduct a secret ballot upon a strike. The reason why failure to conduct a secret ballot may not furnish ground for remedial action is that the sole consequence of such failure, under the interpretation given the statute by the state court, is that the participants may not then claim the benefit of certain priv-

ileges extended to strikers by other sections of the Wisconsin statutes.

ARGUMENT

I.

THE ORDER OF THE STATE BOARD DOES NOT VIOLATE ART. I, SEC. 8 OF THE CONSTITUTION CONFERRING UPON CONGRESS THE POWER TO REGULATE COMMERCE AMONG THE STATES

The petitioners have argued first that the state action was in direct conflict with Congressional legislation, and secondly that the whole subject matter is beyond the jurisdiction of states. It seems to this respondent that the latter question ought logically to be settled first before there is even occasion for consideration of the other. We are, therefore, covering under this heading the subject matter considered under the first and second headings of the petitioners' brief, but in reverse order.

At the outset, we desire to make it clear that the respondents do not here contend that it would be beyond the power of Congress to pre-empt the field of labor-relations regulation so as to oust states of all jurisdiction in such field, even as to intrastate enterprise; neither do the respondents contend in the presentation of this case that there is *any* field of enterprise with respect to which state power supersedes that which Congress has conferred upon the National Labor Relations Board. That is true even with respect to such traditionally intrastate ventures as the

corner grocery, because the respondent recognizes that there is no enterprise so local in character that facts cannot be shown to warrant a finding that it has an "effect" upon interstate commerce.

The Wisconsin Supreme Court has laid down a guiding rule for its state agencies in *Allen-Bradley Local 1111 v. Wisconsin E. R. Board*, (1941) 237 Wis. 164, 179, 295 N. W. 791 (affirmed in 315 U. S. 540, 62 S. Ct. 820, 86 L. ed. 1154 (1942)), and that rule is followed without variation. The State Supreme Court said:

"* * * To the extent that the orders of the National Labor Relations Board apply in a particular controversy, the jurisdiction of state authorities, both administrative and judicial, is ousted. When under the facts of a particular case interstate commerce is substantially affected and the National Labor Relations Board takes jurisdiction, its determinations are final and conclusive, the determination of any state authority to the contrary notwithstanding."

The state board follows that principle meticulously. It dismisses any proceeding before it if it is shown that the National Board has taken jurisdiction over the same subject matter, irrespective of what action may be taken by the National Board. See in illustration the order of the state board issued May 21, 1948 *In the Matter of the Petition of International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, C. I. O. for Determination of Bargaining Representatives for Employees of Kearney & Trecker Corporation*, Case II, No. 1994 E-725, Decision No. 1336, in which the state board dismissed a petition for the conduct of an election to determine a bargaining representative, because it was shown that the Na-

tional Board had conducted an election several years earlier among the same group of employees.

Secondly, the respondents do not assert the authority to act in such a manner as to defeat any substantive provision of an act of Congress governing labor relations, even though jurisdiction in the particular case has never been assumed by the National Board. As an illustration, see the order of the state board issued on August 21, 1948 *In the Matter of the Petition of United Steel Workers of America, C. I. O. for Determination of Bargaining Representatives for Employees of Crown Can Company, Case I, No. 2195, E-769, Decision No. 1738-A, 22 L. R. R. M. 1369* in which the state board dismissed a petition to conduct an election for a bargaining representative where the petition was filed by a labor organization which had not complied with the provisions of federal law relating to the filing of financial statements and non-communist affidavits.

To summarize: (1) The respondent board does not claim the right to act in any case in which a national agency has assumed jurisdiction of the same subject matter. (2) This respondent does not claim the right to act in such a manner as to defeat a substantive policy of federal legislation.

To state the position affirmatively: The respondent board believes it has the duty, in line with the principle of a coordinate federal-state system of government, to act with respect to labor controversies arising within its borders where federal agencies either cannot, or do not desire to, deal with such controversy; and then to deal with such controversies in a manner not repugnant to federal policy.

The respondents do not in this case, nor in any other, seek to impose their services unsolicited. They act within

the narrow boundaries above described only when their services are sought by some petitioner who needs relief.

A. Congress has not Pre-empted the Entire Field of Labor Relations so as to Prohibit the Type of State Action Involved in this Case

While there is probably no enterprise of such a nature that there would not be circumstances warranting a finding that its operation "affects" commerce, there are many controversies to which federal legislation is, as a matter of practice, never applied. Such controversies, indeed, probably far exceed in number the ones to which federal legislation is applied, either because of limitations of policy or limitations of facilities resulting from lack of appropriations.

The United States Supreme Court has held that the National Labor Relations Act, 49 Stats. 449, 450, 29 U. S. C. A. secs. 151-166, could not be applied to any specific case except through the machinery supplied by the Act, i.e., action of the National Labor Relations Board. See *Amalgamated Utility Workers v. Consol. Edison Co.*, (1940) 309 U. S. 261, 84 L. ed. 738, 60 S. Ct. 561. The same must be true of the Labor-Management Relations Act, 1947, 61 Stat. 136 et seq., 29 U. S. C. A. Supp. secs. 141-197, because the enforcement provisions are the same.

There are a number of prerequisites to the application of the unfair practice provisions of the federal act.

First, Congress provided that the National Labor Relations Act and its successor, the Labor-Management Relations Act, 1947, can be applied to an unfair practice only upon a finding by the National Labor Relations Board, upon the basis of facts shown in the specific case, that the par-

particular unfair practice affects commerce. While there are some provisions of the Labor-Management Relations Act, 1947, which are made applicable to industries affecting commerce (See 61 Stat. 156; 29 U. S. C. A. Supp. secs. 185 (2) (b) for instance, relating to conciliation of labor disputes), that is not true with respect to unfair practices. One of the jurisdictional prerequisites which Congress has fixed as to unfair practices is that the National Board must find on the facts before it that the particular unfair practice affects commerce.

Second, the National Board may not move at all on its own initiative, but must await the filing of an unfair practice charge. There are many cases where the person injured by an unfair practice does not have the knowledge nor the means to apply for help to the national agency, but is able to apply to a more accessible local agency.

Third, even where application is made for the services of the National Board, and it finds that the particular matter affects commerce, it does not, and need not, always accept jurisdiction. As pointed out in *National L. R. Board v. Indiana & Michigan Elec. Co.*, (1943) 318 U. S. 9, 63 S. Ct. 394, 400, 87 L. ed. 579:-

“* * * It is not required by the statute to move on every charge; it is merely enabled to do so. * * *”

The discretion to decline to act is sometimes exercised on the basis that the extent of the affect of a particular unfair practice is not so great as to warrant the use of the overtaxed facilities of the National Board. An illustration of such a case is the order issued by the National Board on July 30, 1948 in *Sta-Kleen Bakery, Inc.*, 78 N. L. R. B. 94, 22 L. R. R. M. 1257, in which the National Board de-

clined to exercise its jurisdiction although it found that 70% of the employer's supplies came to it from another state.

The controversy which was the basis of the state action under review in the instant case arose in intrastate commerce, and the enterprise in which it arose was an intrastate business. The United States Supreme Court decided in *A. L. A. Schechter Poultry Corporation v. United States*, (1935) 295 U. S. 495, 546 et seq., 55 S. Ct. 837, 850 et seq., 79 L. ed. 1570, 97 A. L. R. 947, and in *Carter v. Carter Coal Co.*, (1935) 298 U. S. 238, 303 et seq., 56 S. Ct. 855, 80 L. ed. 1160, and in the many cases cited therein,* that manufacturing and processing within the confines of a state are intrastate business even though the manufacturer or processor receives his supplies from other states and even though his products are intended for sale and consumption in other states.*

We do not raise this point in order to assert that Congress could not, if it chose, legislate to preclude states from acting, even in connection with such intrastate industries; but only to substantiate our contentions that as to unfair practices arising in intrastate commerce, as distinct from those actually arising in interstate commerce, Congress did not intend to preclude injured persons from having any relief at all where federal facilities are not made available. We do not believe that Congress intended that coercive tactics should as a matter of law be exempt from all restriction in such cases, especially tactics which have the practical effect of defeating collective bargaining.

*While these cases have been modified insofar as they delimit Congressional power, we take it they still represent the standards for determining what is "commerce."

The United States Supreme Court recognized in *Consolidated Edison Co. v. National Labor Relations Bd.*, (1938) 305 U. S. 197, 222, 223, 83 L. ed. 126, 59 S. Ct. 206, 214, that Congress contemplated supplementary state regulation. The court said:

"* * * And whether or not particular action in the conduct of intrastate enterprises does affect that commerce is such a close and intimate fashion as to be subject to federal control, is left to be determined as individual cases arise. *Id.*, see, also, *Santa Cruz Fruit Packing Co. v. National Labor Relations Board*, 303 U. S. 453, 466, 467. * * *

"* * *

"* * * But it is also true that where the employers are not themselves engaged in interstate or foreign commerce, and the authority of the National Labor Relations Board is invoked to protect that commerce from interference or injury arising from the employers' intrastate activities, the question whether the alleged unfair labor practices do actually threaten interstate or foreign commerce in a substantial manner is necessarily presented. And in determining that factual question regard should be had to all the existing circumstances including the bearing and effect of any protective action to the same end already taken under state authority. * * *" (Emphasis supplied)

The case of *Bethlehem Steel Co. v. New York Labor Rel. Bd.*, (1947) 330 U. S. 767, 67 S. Ct. 1026, 1030, 91 L. ed. 1234, is the strongest authority which could be cited for the contention that Congress has precluded state action. That case recognizes a number of circumstances in which Congress indicated an intent to leave room for sup-

plemental state action in the field of labor relations. They are:

1. " * * * It [the National Labor Relations Act] has dealt with the subject or relationship [of employer and employee] but partially, and has left outside of the scope of its delegation other closely related matters. Where it leaves the employer-employee relation free of regulation in some aspects, it implies that in such matters federal policy is indifferent. * * * "
2. " * * * where effective regulation must wait upon the issuance of rules by an administrative body. In the interval before those rules are established, this Court has usually held that the police power of the state may be exercised. * * * "
3. " * * * when federal administrative regulation has been slight under a statute which potentially allows minute and multitudinous regulations of its subject * * * or even where extensive regulations have been made, if the measure in question relates to what may be considered a separable or distinct segment of the matter by the federal statute and the federal agency has not acted on that segment, the case will be treated in a manner similar to cases in which the effectiveness of federal supervision awaits federal administrative regulation. * * * The states are in those cases permitted to use their police power in the interval."
4. The Supreme Court did not pass in the Bethlehem Steel case upon the right of the states to act in matters in which the National Board might elect "to decline jurisdiction * * * for budgetary or other reasons."

The facts in the instant case are wholly different from those in the *Bethlehem Steel* case, so that the result there reached does not furnish authority to indicate that the type of action taken by the state in the instant case is objectionable. We believe that the action here involved falls within the fields recognized by Congress as appropriate for consistent supplementary state action under the foregoing rules.

The tactics dealt with by the state in this case are not covered by federal statute. As the petitioners pointed out, it was an "experiment" (R. 48), which officers of other labor organizations "did not think * * * could be done." Since the tactics were new, Congress had had no occasion to consider or deal with them. The circumstances illustrate one of the functions of our dual form of government in which states furnish the laboratories for pragmatic regulation so that when the time is ripe for regulation on a national scale Congress may have the benefit of their experience.

The authority of the National Labor Relations Board to deal with unfair practices is expressly limited by Congress, and made exclusive, only as to unfair labor practices "listed in sec. 8" of the Federal act, title I, sec. 10a, 29 U. S. C. A. Supp. 160. That leaves an implication that Congress intended states to have the power and authority to deal with other types of conduct which might be found objectionable, so long as the state does not deal with such matters in a manner to stand "as an obstacle to the accomplishment * * * of the full purposes and objectives of Congress." (The latter phase of the discussion will be dealt with under the succeeding heading.) The practices in this case fall within the classification described in the *Bethle-*

hem Steel case as to which the rule is "conduct over which no direct or delegated federal power was exerted by the National Labor Relations Act is left open to regulation by the state."

The petitioners have asserted at page 50 of their brief that Congress has "made clear its intention to pre-empt the field of unfair labor practices * * * with the possible exception of the ordinary police power of the state." Whatever a state may do in the field of regulating tactics in labor disputes is necessarily in the exercise of its "ordinary police power." If Congress intended the states to have any power in that field at all, the dividing line must be at the place where Congress delimited and circumscribed its own prohibitions, not at some other point which is indefinable or unascertainable on the basis of any standard fixed by Congress.

The Wisconsin law, for instance, classifies as an unfair practice certain types of mass picketing which "obstruct or interfere with free and uninterrupted use of public roads, streets, highways, railways, airports, or other ways of travel." Does the fact that these tactics are designated as *unfair practices* place them in a field precluded by Congress? From the language Congress has used the line of demarcation is at the point where it stopped its own regulation—unless it be deemed that Congress intended to stamp the term *unfair practice* with a sort of trademark reserving the exclusive right to its use.

The petitioners have called attention at page 52 of their brief to specified provisions of the federal legislation and of Wisconsin statutes, which are asserted to involve variances. We do not believe there is any irreconcilable

difference in any of the provisions, but will not here enlarge upon the reasons because, as this court pointed out in *Allen-Bradley Local 1111 v. Wisconsin E. R. Board*, (1942) 315 U. S. 740, 747-748, 62 S. Ct. 820, 86 L. ed. 1154:

"We are not under the necessity of treating the state Act as an inseparable whole. * * * Rather, we must read the state Act, for purposes of the present case, as though it contained only those provisions which authorize the state Board to enter orders of the specific type here involved. That Act contains a broad severability clause. The Wisconsin Supreme Court seems to have been liberal in interpreting such clauses so as to separate valid from void provisions of statutes. Aside from that, Wisconsin in this case has in fact applied only a few of the many provisions of its Act to appellants. And we have the word of the Wisconsin Supreme Court that 'the act affects the rights of parties to a controversy pending before the board only in the manner and to the extent prescribed by the order.' * * * That construction is conclusive here. * * * Hence we need not speculate as to whether the portions of the statute on which the order rests are so intertwined with the others that the various provisions of the state Act must be considered as inseparable. Since Wisconsin has enforced an order based only on one part of the Act, we must consider that portion exactly as Wisconsin has treated it—complete in itself and capable of standing alone.' * * *

The petitioners also complain that unless we dispose of this case by assuming that Congress has precluded state legislation entirely, employers and employees will have to "guess" which of 49 sets of rules govern. It is our Constitution which has set up a dual system of federal and

state government and for generations citizens have been accustomed to manage their affairs so as to conform both to federal law and the law of the forum in which they act. Only in the case where one law requires something that is forbidden by the other does a difficulty arise. That is not the case here. The argument that a citizen should not be subject to more than one set of laws is an argument against the federal system of government which is provided for in the constitution. The argument seems anomalous in urging that a law should be invalidated under the same constitution.

It remains only to determine whether regulation of the tactics here involved stands as an obstacle to the accomplishment of any of the purposes or objectives of the Labor-Management Relations Act, 1947.

B. The Order of the State Board does not Deprive the Petitioners of any Right Guaranteed to them by Congressional Enactment

- (1) The restrained tactics are not protected by sec. 7 of the National Labor Relations Act, nor the corresponding provisions of the Labor-Management Relations Act, 1947

The petitioners urge that the order of the Wisconsin board attempts to deprive them of rights guaranteed to them under the National Labor Relations Act and under its successor, the Labor-Management Relations Act, 1947, so that the state action is invalid under the rule of *Hill v. State of Florida*, (1945) 325 U. S. 538, 65 S. Ct. 1373, 89 L. ed. 1782.

The restriction in the instant case is, of course, a far cry from that involved in *Hill v. State of Florida, supra*, where there was involved legislation of general application affecting interstate and intrastate enterprises alike, and under which an injunction was issued restraining a labor organization from functioning at all, even in behalf of employees of a firm actually "engaged in" interstate commerce. The restraint here, on the contrary, does not prohibit collective bargaining, but is directed against a tactic seeking to defeat bargaining and to substitute unilateral control. The order of the state board, as construed, is narrowly adjusted to prevent only the *instigation* of the particular type of concerted coercive activity here involved. The challenge to the validity of the order calls for a determination whether Congress intended to guarantee to the petitioners the right to do what they did in this case.

Sec. 7 of the National Labor Relations Act, 49 Stat. 452, 29 U. S. C. A. sec. 157, stated that employees should have the right "to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection." The Labor-Management Relations Act, 1947, repeated that provision in the same words and added that employees should also have the right to refrain from such activities. 61 Stat. 140, 29 U. S. C. A. Supp. sec. 157.

Assuming that Congress intended to prohibit states from regulation of such activities as are described in the foregoing provision, the question to be determined is the nature and extent of the activities included. The Labor-Management Relations Act, 1947, makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157." 61 Stat. 140, 29 U. S. C. A. Supp. sec. 158.

It follows logically that if the tactics are of a kind which Congress has withdrawn from state regulation by implication, the same tactics are protected by the foregoing express provision against any interference or discipline by management.

The United States Supreme Court commented in *Amalgamated Utility Workers v. Consol. Edison Co.*, (1940) 309 U. S. 261, 263, 84 L. ed. 738, 60 S. Ct. 561, that sec. 7 did not create new rights but was merely definitive of the rights which existed at the time of the enactment of the National Labor Relations Act. Since the tactics here involved are recognized by the actors themselves as "new," "experimental" tactics devised since the enactment of sec. 7, it follows that Congress could not have had such specific activities in mind when it framed its protective guaranty.

Cases decided by the United States Supreme Court establish that the provisions of the federal statute above quoted do not make immune from state regulation or from employer discipline all concerted activities of individuals purporting to act in behalf of employees, even when such activities are undertaken for mutual aid or protection.

It was held in *Allen-Bradley Local 1111 v. Wisconsin E. R. Board*, (1941) 315 U. S. 740, 62 S. Ct. 820, 86 L. ed. 1154 that federal statutes do not guarantee the right to engage in mass picketing, to picket employees' domiciles, or to threaten employees who desire to work (the latter of which is one of the prohibitions imposed in the instant case), although it was clear that such activities were "concerted" and were undertaken for "mutual aid or protection."

It was held in *Hotel & R. E. I. Alliance v. Wis. E. R. Board*, (1942) 315 U. S. 437, 86 L. ed. 946, 62 S. Ct. 706 that

the federal statutes do not guarantee the right to engage in any concerted activities involving violence.

It was held in *National Labor Relations Board v. Fansteel M. Corp.*, (1939) 306 U. S. 240, 83 L. ed. 627, 59 S. Ct. 490, 496, that Congress did not intend to include sit-down strikes within the concerted activities recognized in the National Labor Relations Act. The court there said that section 13 of the National Labor Relations Act, which provides that nothing in the act "shall be construed so as to interfere with or impede or diminish in any way the right to strike" contemplates "a lawful strike,—the exercise of the unquestioned right to quit work." It was there held that a strike illegal in its inception and prosecution was not the exercise of "the right to strike" to which the act referred. The court went on to say:

"It was not a mere quitting of work and statement of grievances in the exercise of pressure recognized as lawful."

Generally speaking, the court defined the type of activities which were intended to be recognized and protected by the National Labor Relations Act in the following words:

"* * * Congress was intent upon the protection of the right of employees to self-organization and to the selection of representatives of their own choosing for collective bargaining without restraint or coercion."

In *National Labor Relations Bd. v. Sands Mfg. Co.*, (1939) 306 U. S. 332, 83 L. ed. 682, 59 S. Ct. 508, the United States Supreme Court held that conduct in violation of a contract was not the type of concerted activity with which

an employer is prohibited by federal legislation from interfering.

The Circuit Court of Appeals for the Fourth Circuit held in *National Labor Relations Board v. Draper Corporation*, (1944) 145 F. 2d 199, that Congress did not intend to include within whatever protection it accorded to concerted activities such conduct as a "wildcat" strike, pursued in violation of contract and in violation of purposes of the National Labor Relations Act. The court made the following pertinent comment: (loc. cit. 145 F. 2d 202-203):

"The question is narrowed, then, to whether what was done amounts to an unfair labor practice within section 8 (1) of the act. This depends on whether or not the 'wild cat' strike, in which the discharged employees were engaged, falls within the protection of section 7 of the act. If it does, a discharge on account thereof would clearly be interference and coercion with respect thereto within the meaning of section 8 (1).

* * *

"* * * we are of opinion that the 'wild cat' strike in which the employees were engaged and for which they were discharged was not such a concerted activity as falls within the protection of section 7 of the National Labor Relations Act, but a strike in violation of the purposes of the act by a minority group of employees in an effort to interfere with the collective bargaining by the duly authorized bargaining agent selected by all the employees. *The purpose of the act was not to guarantee to employees the right to do as they please but to guarantee to them the right of collective bargaining for the purpose of preserving industrial peace.* * * *" (Emphasis supplied)

In *Southern S. S. Co. v. National Labor Relations Board*, (1942) 316 U. S. 31, 62 S. Ct. 886, 86 L. ed. 1246, there was held invalid an order of the National Labor Relations Board to the effect that a strike aboard ship was protected by the law against disciplinary action by the employer. The United States Supreme Court held that, since such a strike was made unlawful by the Criminal Code, it was not the type of concerted activity which Congress intended to protect by the guarantee contained in the National Labor Relations Act.

The National Labor Relations Board also recognized that there are types of concerted activities which are not protected by the National Labor Relations Act and its successor. For a recent example, see *Fontaine Converting Works, Inc.*, 22 LRRM 1149, 77 NLRB #216. It was there held by the National Board that concerted activities undertaken in behalf of another, and not for the employees' advancement or protection, were not of a character protected by the National Labor Relations Act. See, also, *International Longshoremen's Union*, 22 L. R. R. M. 1001, October 25, 1948, in which it was held that concerted activities are not protected when they infringe upon the rights of others to refrain from such activities. The board pointed out that the right to refrain from concerted activities which is guaranteed by federal legislation includes the right "to go to and from work without restraint or coercion while a strike is in progress."

Even in one of the early cases cited by the petitioners, *Harnischfeger Corporation*, 9 N. L. R. B. 676, the National Board quoted sec. 7 of the National Labor Relations Act relating to rights of employees and said:

"* * * We do not interpret this to mean that it is unlawful for an employer to discharge an employee for any activity sanctioned by a union or otherwise in the nature of collective activity." * * *

It is clear, then, that Congress did not intend to place beyond state regulation, and beyond protective action by an employer *all* concerted activities. Generally speaking, the type of activities for which an employer may not impose discipline (and as to which state regulation might be said to be contrary to the objectives of the federal law) are such activities as look toward collective bargaining "without restraint or coercion" on either side. It was not the intent of Congress that persons acting purportedly for employees' groups should be authorized to use *any* type of tactics which they might choose. Presumably Congress intended whatever guarantee it gave to extend only to the type of activities which were recognized as lawful at the time of the enactment.

There are few authorities dealing with the exact tactics utilized in this case, probably for the reason that the tactics are, as recognized by the petitioners, new. In the only case in which the type of tactics now before the court were passed upon by a federal court, *C. G. Conn, Limited v. National Labor Relations Board*, (1939) 108 F. 2d 390, it was held that such tactics were not within the protective scope of the National Labor Relations Act. The court said: (loc. cit. 108 F. 2d 397):

"* * * Undoubtedly, when petitioner refused to comply with their [the employees'] request, there were two courses open. First, they could continue work, and negotiate further with the petitioner, or, second, they could strike in protest. They did

neither, or perhaps it would be more accurate to say they attempted to do both at the same time. We have observed numerous variations of the recognized legitimate strike, such as the 'sitdown' and 'slow-down' strikes. It seems this might be properly designated as a strike on the installment plan.

"We are aware of no law or logic that gives the employee the right to work upon terms prescribed solely by him. That is plainly what was sought to be done in this instance. It is not a situation in which employees ceased work in protest against conditions imposed by the employer, but one in which the employees sought and intended to continue work upon their own notion of the terms which should prevail. If they had a right to fix the hours of their employment, it would follow that a similar right existed by which they could prescribe all conditions and regulations affecting their employment."

The petitioners have suggested that the *Conn* case, *supra*, is distinguishable from the case at bar because there the employees refused to work overtime, whereas here the absences were in part during hours scheduled as regular time. It would seem an illogical distinction if a court were to hold that refusal to work overtime is an activity unprotected by Congress, for which an employer might discipline, but that he could not impose discipline for refusal to work during *regularly scheduled hours*. If anything, the distinction would militate in favor of the validity of the restraint here involved; because surely a refusal to work overtime is a lesser interference with functions of management than a refusal to work during regular hours. In any event, the plan put into operation in the instant case by the petitioners did include refusal to

permit employees to work on Saturday mornings which were scheduled working hours at overtime pay. The petitioners urge that the state board did not rely for its order upon the refusal of the petitioners to permit Saturday work. The board based its order, of course, upon the totality of the entire program, and not upon its separate elements.

The other distinction petitioners seek to make for the *Conn* case is that the objective of the tactics was different. That distinction, too, operates in favor of the contentions of the state board in the instant case. In the *Conn* case, there was no question that the exact objectives of the employees were made known, and that they were legitimate. In the instant case, the petitioners had made illegal demands, and then declined during their coercive program to commit themselves to any definite objective, thus reserving to themselves the right later to disown the objectionable parts of earlier demands.

The National Board was a party to the *Conn* case; and having accepted the result it has presumably adjusted its policies to accord with the precedent. Earlier decisions of the board cited by the petitioners can carry no weight in the light of this case, if they are contrary to its holding.

The petitioners have endeavored to show that each component part of their program, considered separately, was unobjectionable. See pages 21 and 42 of their brief where it is said that neither the nature of the activities nor their purpose is objectionable. This assertion we deem incorrect; but even if it were true, that would not establish that the combination was necessarily unobjectionable. Such a conclusion is no more sound than to say that payment of a bribe to a public officer is unobjectionable on the ground that neither an attempt to influence him nor the payment

of money to him, if considered separately, is wrongful. It is the combination of circumstances which is sought to be prevented, not any single component part. The conduct must be judged by its totality, as this court said of the conduct involved in *National Labor Relations Bd. v. Virginia Electric & P. Co.*, (1941) 314 U. S. 469, 86 L. ed. 348, 62 S. Ct. 344. The court there held that the "total activities" were to be considered, rather than the effect the component words or acts might have had in isolation.

Even if we were to consider separately the methods and objective of the tactics here involved, neither is innocuous. The petitioners have iterated, and reiterated, in their brief that one objective was to compel the employer to conform to a War Labor Board directive. A directive which was admittedly not received by the petitioners until December 31, 1945 and not served upon the employer until January 17, 1946 could not have been the objective of a program adopted two months earlier, on November 3, 1945. The claim is an afterthought which serves chiefly to illustrate that an essential part of the plan was to avoid being committed upon the objective. When the directive of the War Labor Board finally reached the employer it included two items with which the employer could not then legally comply because of lack of compliance with conditions of state law (similar to the conditions in the Labor-Management Relations Act, 1947, with respect to compulsory unionism and check-off of dues), and because the War Labor Board had by then been abolished so that a directive by it no longer operated to suspend requirements of state law. The state board could not base its order on illegality of purpose, because the petitioners had declined to commit themselves as to their objectives until the hearing before the

board—and even then their position shifted on the questions of maintenance of membership and check-off.

The means of pressure, likewise, involves many elements which are objectionable from the point of view of public interest. These are analyzed in later discussion. The method was recognized by the petitioners, who are experienced leaders, as a new device of their own, and they stated other leaders did not think it "could be done." This would seem to establish that the tactic was not one of the traditional, established weapons as is now claimed.

Of the forms of concerted activity known to Congress at the time of the enactment of the National Labor Relations Act, the one most nearly analogous to that involved in the instant case is probably the sit-down strike. Under the tactics now before the court the employees retain control over the means of production. They do not relinquish the employment so that the means of production may be utilized by other persons who might be desirous of working. In the ordinary form of strike, the employer may engage other employees to carry on production. The means of production are left free. Under the method now in question, one of the chief advantages from the petitioners' point of view is that almost the entire sacrifice is shifted to others. An essential of the plan is continuous retention of the employment with the privilege of directing employees to be absent without notice, and without permission of management, as frequently as the petitioners choose. Under such a plan the productive equipment is under their control, so that it can not be used except when the petitioners are willing.

By the recognition of the rights of employees contained in sec. 7 of Title I of the Labor-Management Relations

Act, 1947, 61 Stat. 140, 29 U. S. C. A. Supp. sec. 157, Congress did not intend to bestow upon third parties an inalienable right to instigate employees to engage in unfair or unlawful concerted activities which would have the ultimate result of interfering with production and obstructing the flow of commerce. That is shown by the Congressional findings and declaration of policies contained in sec. 1 of Title I of the Act, (61 Stat. 136, 29 U. S. C. A. Supp. sec. 151) to the effect that:

"Experience has further demonstrated that certain practices by some labor organizations, their officers, and members *have the intent or the necessary effect of burdening or obstructing commerce* by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or *through concerted activities which impair the interest of the public in the free flow of such commerce*. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed." (Emphasis supplied)

By the above declaration Congress has shown that it did not intend either to protect or to encourage the kind of concerted activities "which impair the interest of the public in the free flow of commerce."

The restraint involved in the attacked portion of the Wisconsin Board's order does not apply to individual employee participation in any type of activity. (The only portion of the Wisconsin order which applies to individual employee participation is the portion which is not here under attack, preventing coercion or intimidation of other employees to join in the program by threat of violence or punishment.) The restraint under attack prohibits only

the inducement of the concerted tactics described. The ultimate question, then, is whether Congress intended to guarantee to third parties the right to "induce" employees, without even temporarily relinquishing their employment, to absent themselves from work repeatedly for short periods of time, without notice and without permission, for the purpose of exercising economic pressure by interference with production.

The practical objective of the activities is to enable the employees' representatives to assume one of the chief functions of management by deciding when the employees should be excused from duty and when they should return. *If such activities are within the scope of sec. 7 of the Labor-Management Relations Act, 1947, management is prevented by law from interfering with them, or from taking any steps to discourage them.*

The petitioners have stated that it would be an anomaly if the state could prevent activities for which the employer might not impose discipline (see pages 25, 39 of petitioners' brief). We are disposed to agree. It is, however, our contention that Congress did not intend this particular type of tactic to be made immune from either regulation by the state or discipline by management. The petitioners have urged that this situation places the respondent board on the horns of a dilemma: that both the state and management are precluded by Congress from interfering with this tactic, or else the employer is at liberty to discharge and there is no need for governmental regulation. The latter conclusion is not only a *non sequitur* but is wholly irrelevant to constitutional considerations. It is a *non sequitur*, because the fact that individuals have a right to defend themselves from unwarranted aggression has never

been recognized as a reason why a government should not act in the interests of public peace to prevent the aggression, in the first instance. The state law seeks to substitute the "processes of justice" for "trial by combat" (Sec. 111.01 (4), Wisconsin Statutes), and thus to avoid the infliction upon the public of the results of the bitterness entailed in leaving all disputes to settlement by retaliatory methods.

Secondly, it is our understanding that whether there is a need for legislation presents a matter of policy for the law-making body rather than a constitutional question.

Both the Wisconsin Employment Peace Act, and the Labor-Management Relations Act, 1947, show by their findings and declarations of policies that it was intended that labor relations should be governed by mutual responsibility on the part of both parties and that both sides should have a reciprocal obligation to subordinate the furtherance of their self-interest to the welfare of the public. Congress did not intend to legalize any conduct which is directed toward unilateral control with resultant concentration of power on either side.

It has been suggested that the interest of the public would suffer less from periodic interferences with production than from full time strikes. Such a viewpoint is concerned only with immediate effects, and disregards the inroads which in the long run would be substantially more devastating to the flow of production. The state legislature has sought to avoid practices most devastating to the ultimate flow of production. Its method of seeking that result is by establishing standards of conduct in the use of economic coercion. It has said that the strike, if lawfully exercised, is a permissible practice; but it has said that certain

other types of interruption of production, even though they may have a less extensive effect in the particular dispute, are not permissible if they involve less fair methods. A strike as heretofore recognized, involves certain bilateral elements. A weapon which would leave arbitrary power on either side might result ultimately in a far greater curtailment of production than would a strike in which both parties openly and frankly avow their respective positions.

The Wisconsin Employment Peace Act (Secs. 111.01 to 111.19 of the Wisconsin Statutes for 1947) is very similar to the Labor Management Relations Act, 1947. The same act has prevailed in Wisconsin since 1939. During part of that time the state act was substantially different from the federal legislation. It differed so substantially that it was several times asserted that the state law was invalid because of inconsistencies. During that time when the state law was sufficiently different from the federal legislation so that it might have been contended, with considerably more justification than now can be done, that the state regulation denied privileges given by the federal law, the state regulation was uniformly upheld. See *Hotel and R. E. I. Alliance v. Wis. E. R. Board*, (1942) 315 U. S. 437, 86 L. ed. 946, 62 S. Ct. 706, *Allen-Bradley Local 1111 v. Wis. E. R. Board*, (1941) 315 U. S. 740, 62 S. Ct. 820, 86 L. ed. 1154, and *Christoffel v. Wis. E. R. Board*, (1943) 320 U. S. 776, 88 L. ed. 466, 54 S. Ct. 90 (certiorari denied). The objectives of state and federal legislation are the same under the present laws. The Wisconsin legislature has not sought to undermine, but rather to support, the national policies. Both the Labor-Management Relations Act, 1947, and the Wisconsin Employment Peace Act are directed to the common purpose of preventing industrial conflict by preventing un-

due infringement by one party to a dispute upon the rights of the other or upon the rights of the public. The Wisconsin act differs from the federal act in certain details, but not in theory. The Wisconsin legislature has not aimed to curtail any of the guaranties of the federal act but has extended further protection. The Wisconsin law imposes upon the employer the same obligations with respect to collective bargaining as does the federal act and restricts interference by employers and third parties with concerted activities of employees in almost identical terms. In administration of the act no case can be cited in which the Wisconsin board has failed to defer to the rulings of the National Labor Relations Board when the latter assumed jurisdiction.

We submit that the activities prevented by the state regulation, rather than the regulation, are contrary to the spirit of the federal law.

- (2) The restrained tactics are not protected by sec. 13 of the National Labor Relations Act nor by the corresponding provisions of the Labor-Management Relations Act, 1947

The petitioners have quoted at page 31 of their brief sec. 13 of the National Labor Relations Act, 29 U. S. C. A. sec. 163, which provides that nothing "in this Act" shall be construed to interfere with the right to strike. The corresponding section of the Labor-Management Relations Act, 1947, 29 U. S. C. A. Supp. sec. 163, adds "or to affect the limitations or qualifications on that right" which demonstrates that Congress recognized that even the right to strike (which is not here involved) is not absolute.

The petitioners then quote at page 33 of their brief the definition of a strike contained in sec. 501 (2) of the Labor-Management Relations Act, 1947, 29 U. S. C. A. Supp sec. 142 (2), which includes any concerted interruption. The definition which Congress gives the term includes sit-down strikes, as well as other forms not recognized as legal. The definition was made inclusive primarily to implement the machinery provided in the act to prevent interruptions of production. There is nothing anywhere in the federal legislation to indicate that Congress intended to legalize all forms of strike activity—for example the sit-down, which is included in its definition of a strike.

Here again, we decline to be drawn into argument as to nomenclature. The Wisconsin Supreme Court has said that for purposes of applying state legislation the activities herein involved are not strikes; but the name to be applied does not necessarily settle the questions of constitutionality.

Under the most unfavorable interpretation of the state board's order, nobody could assert that it prohibits all strikes. It prevents the inducement of only one narrow form of interruption to production, the attributes of which are deemed more inimical to ultimate public welfare than those of the recognized lawful strike.

II.

THE RESTRAINT IMPOSED BY THE WISCONSIN BOARD DOES NOT DENY PETITIONERS ANY RIGHTS GUARANTEED BY THE 13th AND 14th AMENDMENTS TO THE CONSTITUTION

As pointed out by this court in *Hotel & R. E. I. Alliance v. Wis. E. R. Board*, (1942) 315 U. S. 437, 440-441, 86 L. ed. 946, 62 S. Ct. 706, the question whether the restraint denies rights guaranteed under the federal constitution is to be determined in the light of the construction given the restraint by the Supreme Court of Wisconsin. Quite naturally, in an endeavor to have the restraint struck down as unconstitutional, the petitioners attempt to attribute to it a far wider meaning than has been given by the courts of Wisconsin. The state supreme court has said that all the order does is to ban the petitioners from engaging in concerted efforts to interfere with production by "doing the acts instantly involved." Any potentially broader effect that might be given the language can have no bearing upon the constitutionality of the ban; because the order as construed by the court is narrow and specific. The only question is whether the constitutional guaranties respecting involuntary servitude, freedom of assembly, and freedom of speech place the specific type of conduct indulged in by the petitioners above regulation. (If the constitutional guaranties prevent regulation, they inhibit federal as well as state action in that respect.)

As pointed out by the state court, the prohibition does not apply at all to individual action, but only to inducing a concerted program of interference with production by specific means. The restraint applies only to the instigation

of the program of absences, and not to a mere participation in them, because it applies only to the interferences with production resulting from "inducing" the action involved. Furthermore, it does not prohibit the calling of strikes because the restraint itself expressly excepts interference resulting from a strike as that term is ordinarily understood.

The state courts held that the conduct involved did not constitute a strike or a series of strikes, and we submit that the holding in that respect was correct. Certainly, if the *intent* of the individuals instigating and participating in the conduct has any bearing, the program of absences involved in this case could not have been a strike or a series of strikes. The petitioners vigorously denied that they intended to strike during the entire period while their program was being carried out. It was only when they came into the hearing before the state board that they altered their position, solely for the purpose of claiming whatever privileges and immunities are incident to strikes.

We believe an examination of authorities throughout all jurisdictions will reveal that a strike involves at least a temporary, conditional suspension of the employment relation. A strike does not involve a severance of the employment relation as would a resignation or abandonment of the employment. All definitions of a strike, however, incorporate the element of "quitting." In the instant case there was no "quitting" and no suspension of the employment relation even for an instant.

It is not the purpose of this respondent, however, to argue whether the proper nomenclature was ascribed to the activities by the Wisconsin courts. We believe that the constitutional issues are to be determined by the substance of the thing prohibited rather than by the name applied to

it. Even if it were conceded, as desired by the petitioners, that the activities involved in this case were a form of strike, the prohibition at its broadest applies only to *that particular form* of so-called "strike." As made clear by the Wisconsin court and by the wording of the order itself, the prohibition does not apply to the activity normally recognized as a strike. It applies only to the form of activity which was described by the petitioners themselves as a "new feature" (R. 47), and an "experiment" (R. 48). For purposes of meeting the constitutional issues respecting involuntary servitude, it is immaterial whether the proscribed activity be classified as a form of a strike or as something entirely different. Wherever the question has come before the federal courts as to the constitutionality of limitations upon, restrictions of, or even prohibitions against, strikes, it has been held that the right to strike is not guaranteed by the constitution. *A fortiori* a prohibition against a particular form of stoppage is not objectionable on constitutional grounds.

In *France Packing Co. v. Dailey*, (C. C. A. 1948) 166 F. 2d 751 the Circuit Court of Appeals for the Third Circuit upheld the provision of the War Labor Disputes Act prohibiting a strike for thirty days after notice, and pointed out the reason why the provisions of the constitution relating to involuntary servitude have no bearing upon legislation regulating strikes. The court said: (loc. cit. 166 F. 2d 753, 754)

"Support for its decision was found by the court below in the Constitutional protection against involuntary servitude; * * *

"The contention that a limitation of the right to strike under the specified narrow conditions of Sec-

tion 8 partakes of involuntary servitude is not substantiated by the cases. To the contrary, there is a wide distinction between a worker quitting his job, for any reason or no reason, on the one hand, and a cessation of production by workers who seek to win a point from management, on the other hand. * * *

* * *

"In brief, the restricted limitation of the right to strike, in this Act, refers to circumstances involving a continuing master and servant relationship. There is no involvement here with the distinct—and unquestioned—right of the worker to quit his job or the right of the employer to discharge him for cause. In this situation we fail to see any true constitutional question in this case." (Emphasis supplied)

In *Dorchy v. Kansas*, (1926) 272 U. S. 306, 47 S. Ct. 86, 71 L. ed. 248 the Supreme Court of the United States upheld a statute of Kansas prohibiting, under criminal sanction, the calling of a strike. The court used the following significant words:

"* * * To enforce payment by a strike is clearly coercion. The Legislature may make such action punishable criminally * * *. And it may subject to punishment him who uses the power or influence incident to his office in a union to order the strike. Neither the common law, nor the Fourteenth Amendment, confers the absolute right to strike. * * *"

The petitioners have cited *Chas. Wolff Packing Co. v. Court of Industrial Relations*, (1923) 262 U. S. 522, 43 S. Ct. 630, 67 L. ed. 1103; (1925) 267 U. S. 552, 45 S. Ct. 441, 69 L. ed. 785 as authority that the Kansas law involved in the above case was unconstitutional. The only part of the

law invalidated in the *Worff Packing Company* case was that imposing compulsory arbitration. The portion making it unlawful "to induce others to quit their employment for the purpose and with the intent to hinder, delay, limit or suspend the operation of mining" was held severable and valid as applied in the *Dorchy* case.

The case of *State ex rel. Hopkins v. Howat*, (1921) 109 Kan. 376, 25 A. L. R. 1210, 198 Pac. 686 is another in which a law restricting strikes was upheld. Writ of error was dismissed by the United States Supreme Court in *Howat v. Kansas*, (1922) 258 U. S. 181, 66 L. ed. 550, 42 S. Ct. 277.

The court has again, very recently, tacitly recognized that there is no constitutional objection to an injunction restraining a union and its officials from encouraging workers to interfere with production by strike or cessation of work. See *United States v. United Mine Workers of America*, (1947) 330 U. S. 258, 91 L. ed. 884, 67 S. Ct. 677.

The District Court of the Northern District of Illinois considered the question expressly in *Western Union Tel. Co. v. International B. of E. Workers*, (1924) 2 F. 2d 993, 994, affirmed 4th C. C. A., 6 F. 2d. 644, 46 A. L. R. 1538; certiorari denied 284 U. S. 630, 76 L. ed. 536, 52 S. Ct. 13, in which an injunction against striking was upheld against attack on constitutional grounds. The court said:

"As to clause 1 of the prayer for a temporary injunction, it is said that it prevents employees from ceasing to work, and therefore imposes involuntary servitude upon them. The right to cease work is no more an absolute right than is any other right protected by the Constitution. Broadly speaking, of course, one has the right to work for whom he will, to cease work when he wishes, and to be answerable to no one unless he has been guilty of a breach of con-

tract. But the cessation of work may be an affirmative step in an unlawful plan. One may not accept employment intending thereby to quit work when that act will enable him to perform one step in a criminal conspiracy. * * * These defendants are under no compulsion to accept employment on buildings where plaintiff's equipment is being installed; and, if they do accept it, they are not permitted to make an unlawful use of it. * * *

We will not attempt to review the decisions of state courts dealing with the subject, not only for the reason that they would not be controlling upon this court in matters involving the federal constitution, but because the variance in approach to the question results in confusion rather than clarity. Most of the cases cited by the petitioners with respect to the right to strike do not involve constitutional questions at all. Many involve the principle of tort, to the effect that there is no liability for injury inflicted by a strike with proper justification. Others involve the policy that equity will not give specific performance of a contract for services.* Such cases, relating to policies of courts of equity,

*None of the cases cited at pages 57 to 59 of the petitioners' brief involves a restraint so narrow as the one challenged here and few of them involve constitutional issues at all.

Bailey v. Alabama, (1910) 219 U. S. 219, and **Pollock v. Williams**, (1911) 322 U. S. 1, involved statutes which, in effect, punished refusal to continue in the service of creditors. The instant case does not require anyone to continue in the service of another. In **Bedford Co. v. Stone Cutters Assn.**, (1927) 271 U. S. 37 the court approved an injunction against certain strike activities as a violation of the anti-trust law (which was later changed to exempt union activities). Even the dissenting opinion did not imply that the injunction was unconstitutional, but urged only that the act of Congress should not be interpreted as authorizing such an injunction.

In **United States v. Hutcheson**, (1911) 312 U. S. 219 the court did not consider or even discuss the question of constitutionality. The issue was one of statutory interpretation, i.e. whether concerted activities were within the prohibition of the Sherman Act, and it was decided that the Congressional intent should be determined in the light of the enactment of the Norris-LaGuardia act. The letting the cases have on the constitutional question of the right to strike

or liability for damages in the absence of legislation, furnish little guidance as to what may constitutionally be done by legislation.

Many of the cases have arisen in connection with the historical doubt of the right to strike at all, and pronouncement of the so-called "right to strike" have been in recognition of the particular jurisdiction's philosophy on the question of public policy in the absence of legislation. Writers sometimes confuse assertions of the so-called "right" to strike in such cases (which is nothing more than a recognition that such action is not unlawful in the absence of legislative proscription) with the inalienable rights guaranteed by the constitution. The mere recognition that a certain

is that strikes may constitutionally be prohibited and that such question is in the field of legislative policy.

The Wisconsin court did not rely upon *Aikens v. Wisconsin*, (1904) 195 U. S. 191 as asserted in petitioners' brief, except as it happened to be cited in the excerpt quoted from *Dorothy v. Kansas*, (1926) 272 U. S. 306.

Arthur v. Oakes, 63 Fed. 319 is discussed in the text. *Union Pac. R. Co. v. Ruef*, (1902) 120 Fed. 102 did not discuss legislative restriction, but referred the policy that equity will not give specific performance of a contract of service. The case applied the doctrine of conspiracy in enjoining unlawful picketing. Neither was any question of constitutionality of legislation before the court in *Iron Moulders' Union v. Allis Chalmers Co.*, (1908) 166 Fed. 15. The court dealt only with the ordinary rules of equity and held that a strike with a lawful objective was not enjoinable in the absence of legislation. *Great Northern Ry. Co. v. Brosseau*, (1923) 286 Fed. 114 dealt with the kind of injunctions which might be issued under the Clayton Act and did impose certain limitations upon the activities of strikers. It had no reference to constitutional issues.

The case of *Stapleton v. Mitchell*, (1915) 50 Fed. Supp. 51 does not hold that the right to strike may not be regulated, much less the right to interfere with production by means other than striking but only that the right to strike may not be abridged by general enactment "in the absence of grave and immediate danger to the community."

The portion of the statute stricken down by the state court in *Ala. St. Fed. of Labor v. McAidory*, (1911) 18 So. 2d 810 was one of broad application similar to some of the provisions in the Labor Management Relations Act, 1947, which have not been held objectionable by federal courts, and it is not comparable to the narrow restraint here involved. *Hotel & Restaurant Employees, Inc. v. Greenwood*, (1917, Ala.) 30 So. 2d 696 dealt with the rule of tort that whether a strike is restrainable depends, in the absence of legislation, upon whether the objectives and the methods are lawful. The right to strike was not involved in *In re Portersfield*, (1916, Cal.) 168 P. 2d 706 but rather the right to solicit memberships. The statute considered by the state court in *Ex parte Blaney*, (1917, Cal.) 181 P. 2d 892 imposed broad general restraints which were stricken down in part because they were too vague as to the obligation imposed.

course of conduct is not unlawful in the absence of prohibition should not be translated into the proposition that the constitution protects such activity from any regulation. There is a vast difference between a right by sufferance and an inalienable right protected by the constitution.

An illustration of the rules followed by the courts in connection with labor disputes may be found in the very first of the group of cases cited by petitioners to support their contention that the right to strike is supported by the Constitution, *Arthur v. Oakes*, (1894) 63 Fed. 310, 25 L. R. A. 414. The court's decision turned upon the powers of a court of equity in the absence of legislation and in its discussion it commented that if regulation were necessary in the public interest, that was primarily a function for the legislature rather than for courts of equity.

Cohn and Roth Electric Co. v. Bricklayers' etc. Local U. No. 1, 1917, 101 Atl. 659 was not concerned with constitutional questions, but primarily with statutory interpretation. It dealt with strikes as torts and held that they did not fall within the terms of a specific statute relating to intimidation.

The case of *American Federation of Labor v. Reilly*, 1919, Cal. 155 P. 2d 115 indicated that a law conditioning the right to strike upon a favorable vote by the majority of the employees involved would be valid notwithstanding independently, but that the particular law was invalid because of the entanglement of such provisions with invalid ones.

The discussion from *Henderson v. Coleman*, 1912, 127 7 So. 2d 117 was not directed toward severance of the contractual employer-employee relationship by strike, but rather toward the refusal of independent contractors who were under no contractual obligation to enter upon performance of work that they did not choose to do.

The case arose upon an attempt to cite two persons for contempt for violation of an injunction, and the decision was based upon the circumstances that these two persons had nothing to do with the act complained of. The implication is clear that if they had instigated a strike, the result would have been different.

Pickett v. Walsh, 1906, Mass. 78 N. E. 773 is another case which dealt with striking solely in the field of tort, and did not involve regulation under the police power.

Lindsay & Co. v. Montana Federation of Labor, 1908, Mont. 96 Pac. 127 dealt with striking solely in the field of tort, and involved not constitutional question. It represents the minority view respecting the effect of combination. See summary in *Teller Labor Disputes and Collective Bargaining*, Vol. 1, sec. 14, pp. 34-39. **National R. Ass'n. of Steam Fitters, Etc. v. Cumming**, 1902, N. Y. 63 N. E. 399 likewise dealt with the question of tort in the absence of legislation.

The petitioners have cited a number of cases involving the equity principle that courts will not grant specific performance of contracts of employment; and have urged that there is no difference in dealing with the conduct of an individual in that respect than in dealing with the conduct of groups acting in concert. That there is a substantial difference in the coercive effect of individual and concerted action is recognized by labor organizations as the primary argument for their programs. The distinction is one which furnishes a reasonable and warranted basis for legislative classification not only in regulation affecting labor disputes but in other forms of legislation. One of the best illustrations of the fact that a thing which is unobjectionable if done independently may become subject to regulation if done in concert, is to be found in the case of *Allen Bradley Co. v. Local Union No. 3*, (1945) 325 U. S. 797, 65 S. Ct. 1533, 89 L. ed. 1939 cited by the petitioners. It was there held that what labor unions might have done lawfully by themselves became unlawful when done in combination with others.

The great majority of American jurisdictions recognize that there is a distinction between concerted and individual action which may form a basis for greater regulation with respect to the former. A good discussion appears in Teller, *Labor Disputes and Collective Bargaining*, Vol. 1, sec. 14, pages 34-39, which reads in part:

"There is a school of thought which contends for an unlimited right to strike at common law, and a corresponding unlimited right to engage in a primary, peaceful boycott. How can combination, it is asked, change the character of an act? It is denied that mere combination can constitute criminal or tortious acts

which each member of the combination is free to do.

* * *

The mold of American law has generally developed an apparent disregard, however, of arguments seeking to justify private collective action. American courts have generally looked askance upon the organized attempt by labor to assert an absolute right to strike. The general rule has been tersely stated in *State v. Stockford* to the effect that "A strike may be lawful or it may be unlawful and criminal." * * * The great preponderance of judicial authority holds that individually blameless acts may become illegal if done in combination. The reasons advanced to explain this disregard by the common law of that which to some courts and writers appear to be unassailable logic are varied and interesting, but in the main beside the point.

* * *

The restriction now before the court for consideration is far narrower than the ones held to be constitutional in the cases cited in this brief. For the purposes of this case it is not necessary to decide whether a legislature may impose general restrictions against striking. It is the respondent's position that it has not imposed *any* limitation upon strikes at all but has couched its prohibition narrowly to prohibit a specific type of coercive tactic which is more inimical to the ultimate public interest in the continuance of production than the strike, because of its tendency toward a unilateral concentration of power. It would seem a self-evident proposition that concentration of power in the hands of any segment or group, whose self-interests do not coincide exactly with those of the public generally, is undemocratic and unwise.

Even if it should be held that the Wisconsin Supreme Court was wrong in holding that the prohibited tactics do not fall within the classification of strikes, the restriction imposed is still far narrower than those upheld in the foregoing cases. Under no circumstances could it be construed as a blanket prohibition against striking. Under the most adverse construction which could be given it, it could be regarded as a restriction against only one form of "strike," which is akin to the sit-down strike in that it does not leave the means of production free for other use.

Certainly the framers of the constitutional guaranty against slavery and involuntary servitude did not have in mind the activities here involved, which the actors themselves have characterized as a "new" tactic for the exercise of concerted coercive pressure. It would doubtless surprise the people who voted for the Thirteenth Amendment to hear it urged as insuring the right to induce persons who have voluntarily accepted employment to absent themselves from work whenever they choose, without notice and without explanation, while still insisting upon the right to retain the employment and prevent others from utilizing the means of production.

Nothing in the state board's order compels anyone to continue in the service of the employer. The employees, whom the petitioners seek to control by inducing their absence from work, entered the employment voluntarily. They apparently do not wish to quit the employment but rather to continue the employment relation of their own volition, without interruption.

There is no ground for urging that there has been a violation of the due process provisions of the Fourteenth Amendment. The requirement of due process means that

there must be opportunity to be heard upon reasonable notice. The record shows that prior to the entry of the order in question an extensive hearing was held before the state board. The petitioners not only had notice but they participated in the proceeding. The state law requires complete judicial review before an order of the state board can be enforced, and the petitioners availed themselves of further judicial review by appeal to the state supreme court. Surely nothing more is necessary to meet the requirements of due process. If anything further is required, it should be remembered that before *any* punishment could be inflicted for violation of the order, a *further* complete judicial hearing would be essential upon a charge of contempt of court.

Nothing in the order under review interferes with the right of the people to assemble peaceably. The only portion of the order which could be related to the right of assembly is that part which directs the union and its officers to cease and desist from *engaging in concerted efforts to interfere with production by arbitrarily calling union meetings and inducing work stoppages during regularly scheduled working hours*. The provision does not prohibit attendance at union meetings under any circumstances; neither does it prohibit the calling of union meetings *per se*. It prohibits only concerted interference with production by "arbitrarily" calling meetings to induce work stoppages. The term "arbitrary" is defined to mean:

"Fixed or done capriciously or at pleasure; without adequate determining principle; not founded in the nature of things; non-rational; * * * (Funk & Wagnall's New Standard Dictionary of the English Language.)

Surely the constitutional guaranty to free assembly was not intended to permit it to be used as a cloak for quite another illegal purpose. It was admitted by union officials that the plan worked out was not from a *bona fide* desire to hold union meetings but rather to procure work stoppages and thereby exercise economic pressure on the employer. (R. 47-48).

As ruled in *Hotel & R. E. I. Alliance v. Wis. E. R. Board*, (1941) 236 Wis. 329, 294 N. W. 632; 295 N. W. 634, affirmed (1942) 315 U. S. 437, 86 L. ed. 946, 62 S. Ct. 706, orders are to be interpreted as applicable to the same type of circumstances as brought about their issuance. Under that rule it was held that an order might be entered restricting picketing generally, without any violation of the guaranty of free speech, because it would be construed to relate only to the objectionable type of picketing which brought about its issuance. The calling of a *bona fide* meeting would not be deemed a violation of the order in the instant case, but only the use of the device of *ostensibly* calling a meeting as a signal for a totally different purpose.

Again, it must be remembered that punishment could be imposed for violation of the order only after another judicial hearing upon a charge of contempt. If the order should ever be construed or applied so as to violate a constitutional guaranty, the aggrieved party still has full recourse to protect his rights by appeal.

III.

**SEC. 111.06 (2) (c) OF THE WISCONSIN STATUTES
IS NOT INVOLVED IN THIS PROCEEDING.
EVEN IF IT WERE, IT IS NOT UNCONSTITUTIONAL
AS CONSTRUED BY THE STATE
COURT**

The Supreme Court of Wisconsin affirmed the finding of the state board that the employees within the bargaining unit represented by Local 232 never conducted an election which directed the calling of a strike.

The court's affirmance of the finding was based upon the fact that the purported vote taken several months after the coercive tactics were begun was not taken by a secret ballot nor did it authorize a strike.

The court's action, however, was nothing more than an affirmance of the findings insofar as the same might become pertinent in future proceedings involving other sections of the statutes. Neither the finding nor the statute relating to strike votes is involved in this proceeding because the board based no remedial action upon it. As pointed out by this court in *Allen-Bradley Local 1111 v. Wisconsin E. R. Board*, (1942) 315 U. S. 740, 747, 62 S. Ct. 820, 86 L. ed. 1154:

"* * * we have the word of the Wisconsin Supreme Court that the act affects the rights of parties to a controversy pending before the board only in the manner and to the extent prescribed by the order." * * *

The reason the board imposed no remedy based on the circumstance of a lack of a strike vote is doubtless because the Supreme Court has construed that portion of the state

statutes as not authorizing any affirmative remedial action for non-compliance. In *Hotel & R. E. I. Alliance v. Wis. E. R. Board*, (1941) 236 Wis. 329, 347-348, 294 N. W. 632, 295 N. W. 634 the state court indicated that the sole consequence of failure to obtain a majority vote to authorize a strike is that in such case the strikers do not have the privileges accorded by sec. 103.53 of the Wisconsin Statutes with respect to strikes authorized by such a vote. The court said:

“ * * * Less than a majority may strike, but they will be under the restrictions of the statutes as to the methods of coercion which they may use. Sec. 103.53 specifies with particularity what may be considered legal in the conduct of a labor dispute. These enumerated means striking employees not guilty of an unfair labor practice are at liberty to employ. Any court or judge is forbidden to restrain the doing of such acts when done in connection with a labor dispute. The sole difference between coercive acts in support of a strike which has been called by a majority of members of a collective-bargaining unit and one which has not been so called is that the members of a minority group do not have the benefit of sec. 103.53, that is, by indulging in an unauthorized strike they lose their privileges under that section and are subject to the provisions of ch. 111, Stats. 1939, relating to unfair labor practices. The character of their coercive acts must then be determined either by submitting the controversy to the board or by the pursuit of legal or equitable remedies in courts of competent jurisdiction. If one merely withdraws from his employment he is not subject to the act.”

The board has regarded the foregoing construction as precluding it from ordering discontinuance of a strike be-

cause of lack of a vote. The finding with respect to a vote may never become material until and unless some proceeding is brought involving sec. 103.53 of the Wisconsin Statutes. Unless such action is taken the particular finding carries no consequence and does not involve the deprivation of any constitutional rights.

This explanation is not given to indicate an opinion that a law precluding strikes except upon a majority vote of the employees involved would be unconstitutional; but rather to avoid extensive argument on a question which is not involved. It would seem that if laws such as the National Labor Relations Act and the Labor-Management Relations Act, 1947, can constitutionally impose upon a minority a bargaining representative by a vote of a majority of employees and thereby deprive the minority of the right to bargain through a representative of their own choosing, it would be no more objectionable to deprive the minority of a right to strike contrary to the wishes of the majority. The bargaining agent chosen by the majority can bind the minority against their will by a no-strike provision in the contract. There is little practical difference to constitutional rights if the same result may be accomplished directly by vote of the majority.

It seems difficult to us to maintain the position that a law may constitutionally impose a bargaining agent upon the minority by vote of the majority but that the same standard is unconstitutional when applied to the subject-matter which may be dealt with by the bargaining agent so selected.

CONCLUSION

The Wisconsin Employment Relations Board is required to recognize and protect *three* major interests, namely: "That of the public, the employee, and the employer." (Sec. 111.01 (1), Wisconsin Statutes for 1947.) The board is endeavoring in this case, as it does in others, to represent all three interests independently of the conflicting interests of the other parties involved. The board's position is stressed primarily for the reason that some aspects of the petitioners' brief appear to deal with the matter as if the only interests involved were the conflicting ones of employer and employee, as on page 67 where the statement is made that "the only danger shown here is that of economic injury to the employer." It is the public interest in continuance of production over the years which warrants the regulation. That interest outlasts the immediate effects upon the parties to any single case.

The board is obligated under the state statute to represent the interests of workingmen as well as of employers and of the public. Its obligation in that respect extends to representation of *all* workingmen rather than those of a small group which advocates a program which may not only run counter to the best interests of workingmen as a whole, but which may indeed be actually contrary to the desires of the great majority. The appellants represent at best a very small segment of the employee population. The interests of employees not represented in this case are, as consumers, adverse to those of the appellants. We believe the great majority of workingmen desire to have their interests represented only by methods which invoke the respect and sympathy of the public.

A concession to one group of employees may be not only inimical to the welfare of others but actually contrary to their desires. Indeed, not every concession to the demands of a particular group serves even its own best interests—just as parental over-indulgence does not serve the ultimate best interests of a child.

In any case, the *dominant* interest represented by the state board must be that of the public. The fact that the remedy which the board is here defending was applied at the instance of an employer is a mere fortuity. In other cases the remedy applied by the state board, in the interests of industrial peace and continuing production, is at the suit of labor organizations or individual employees. That is illustrated by the other Wisconsin cases before the court on this calendar—one of which was commenced at the behest of a labor organization and one at the behest of an individual employee. The legal principles to be followed are the same regardless of who is the suppliant.

If the circumstances in this case were reversed so that similar interruptions of production were caused by an employer so as to interfere with free choice of employees, the state board would be in the position of advancing the same contentions to sustain a similar restriction against employer activity.

In applying restrictions in either case, the board must not infringe unduly upon the rights of the parties as individuals. The nature of the remedy may need to vary according to the circumstances of the party in order to be appropriate; but it has been the understanding of the board that the degree of constitutional protection to which a party is entitled does not depend upon his circumstances. The constitution protects each citizen to the same extent that

it protects every other, so that the principles to be followed may not vary according to who happens to be the challenger.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1948

Nos. 14 and 15

INTERNATIONAL UNION, U.A.W.A., A.F. of L., LOCAL 232;
ANTHONY DORIA, CLIFFORD MATCHEY, WALTER
BERGER, ERWIN FLEISCHER, JOHN M. CORBETT,
OLIVER DOSTALER, CLARENCE EHRLMANN, HERBERT
JACOBSEN, LOUIS LASS,

Petitioners,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E.
GOODING, HENRY RULE and J. E. FITZGIBBON, as
Members of the Wisconsin Employment Relations Board; and
BRIGGS & STRATTON CORPORATION, a corporation,

Respondents.

B R I E F
on behalf of **EMPLOYERS ASSOCIATION**
of **MILWAUKEE, Amicus Curiae**

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EGON W. PECK,

*Attorneys for Employers
Association of Milwaukee,
Amicus Curiae.*

INDEX

SUBJECT INDEX

Page

Statement	1-2
<i>Point 1.</i> The conduct engaged in by the petitioners here is not only not sanctioned by Section 7 of the National Labor Relations Act, but is actually contrary to the objects and purposes of the National Labor Relations Act	
A. Preliminary Statement	2-10
B. Section 7 of the Act must be construed in the light of the declared policy set forth in Section 1 of the Act	2-4
.....	4-10
<i>Point 2.</i> If Section 7 of the National Labor Relations Act were construed as rendering immune the conduct here engaged in, said section would be invalid under the due process provision of the Fifth Amendment of the Constitution of the United States	
.....	10-15
Conclusion	15-16

TABLE OF CASES CITED

Allen-Bradley, Local 1111 v. W.E.R.B., 315 U.S. 740, 86 L. Ed. 1154	7
Amalgamated Utility Workers v. Consolidated Edison Co., 309 U.S. 261, 263, 84 L. Ed. 738	7
Burns Baking Co. v. Bryan, 264 U.S. 504, 68 L. Ed. 813, 32 A.L.R. 661	15
Butchers' Union Slaughter House and Live Stock Landing Company v. Crescent City Live Stock Landing and Slaughter-House Company, 111 U.S. 746, 764-765, 26 L. Ed. 585	15

C. G. Conn Limited v. National Labor Relations Board, 108 F. 2d 390	6, 7
Hitchman Coal & Coke v. Mitchell, 245 U.S. 229, 253-254, 62 L. Ed. 260	12
Home Beneficial Life Insurance Company v. N.L.R.B., 159 F. 2d 280	5, 6
Hotel & R.E. Int. A. v. W.E.R.B., 315 U.S. 437, 86 L. Ed. 946	7
Liggett Co. v. Baldrige, 278 U.S. 105, 73 L. Ed. 204	15
Marbury v. Madison, 1 Cranch 137, 163	11
New State Ice Co. v. Liebmann, 285 U.S. 262, 278, 76 L. Ed. 747	14, 15
N.L.R.B. v. Draper Corp., 145 F. 2d 199	10
N.L.R.B. v. Fansteel Metallurgical Corp., 306 U.S. 240, 83 L. Ed. 627	7
The Oakmar, D.C. Md. 2 F. Supp. 650	15
Truax v. Corrigan, 257 U.S. 312, 66 L. Ed. 254	12, 14

STATUTES CITED

National Labor Relations Act	2, 3, 4, 5
Sec. 111.04, Wis. Stats.	8

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Members of the Wisconsin Employment Relations Board; and
BRIGGS & STRATTON CORPORATION, a corporation,

Respondents.

BRIEF
on behalf of **EMPLOYERS ASSOCIATION**
of **MILWAUKEE**, Amicus Curiae

STATEMENT

The specific portion of the order of the Wisconsin Employment Relations Board which is challenged by petitioners requires them to cease and desist from:

“Engaging in any concerted efforts to interfere with production by arbitrarily calling union meetings and inducing work stoppages during regularly scheduled working hours; or engaging in any other concerted effort to interfere with production of the

complainant except by leaving the premises in an orderly manner for the purpose of going on strike." (R. 17)

It will be noted that the Wisconsin Employment Relations Board preserved intact the right of petitioners to "interfere with production" by "leaving the premises in an orderly manner for the purpose of *going on strike*." (Emphasis supplied)

It is the desire of Employers Association of Milwaukee, in this brief, as amicus curiae, to deal with the following points:

(1) The conduct engaged in by the petitioners here is not only not sanctioned by Section 7 of the National Labor Relations Act, but is actually contrary to the objects and purposes of the National Labor Relations Act.

(2) If Section 7 of the National Labor Relations Act were construed as rendering immune the conduct here engaged in, said section would be invalid under the due process provision of the Fifth Amendment of the Constitution of the United States.

POINT 1

The conduct engaged in by the petitioners here is not only not sanctioned by Section 7 of the National Labor Relations Act, but is actually contrary to the objects and purposes of the the National Labor Relations Act.

A. Preliminary Statement.

Section 7 of the National Labor Relations Act provides:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their

own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection."

Petitioners contend that the order of the Board violates the rights of the petitioners set forth in said Section 7 of the National Labor Relations Act.

Petitioners here, as respondents below, made the same contention before the Supreme Court of Wisconsin. That court rejected the contention, and stated in this connection:

"Respondents seem to argue that sec. 7 of the National Labor Relations Act by providing that 'employees shall have the right to self-organization * * * and to engage in concerted activities for the purpose of collective bargaining or other mutual aid and protection,' gives to employees the right to engage in the 'concerted activities' here involved. Not so. That section does not authorize employees to use concerted activities which are in violation of law. The activities which they are authorized to use in concert are those which are lawful. The activities employed by the respondents in this case were activities which are unlawful under the law of Wisconsin. That only 'concerted activities' to secure a lawful objective are protected is held in *Wisconsin Employment Relations Board v. Milk & Etc. Ass'n.*, supra, in which certiorari was denied by the Supreme Court of the United States, 316 U.S. 668, and in *Retail Clerk's Union v. Wisconsin E.R.B.*, 242 Wis. 21, 6 N.W. (2d) 698. The same is in effect held in *Allen-Bradley Local v. Wisconsin E.R.B.*, 315 U.S. 740, 86 L. Ed. 1154.

"If this is not true how are the states to police the activities of employees as well as employers? If the public interest is to be served there must be cooperation between Federal and state governments or the Federal government must take over the preserva-

tion of peace and good order if it is to effectively protect interstate commerce." (R. 119-129)

B. Section 7 of the Act must be construed in the light of the declared policy set forth in Section 1 of the Act.

As an aid to the construction of the scope of Section 7 of the National Labor Relations Act, we have the statement of the underlying findings and policy which prompted the adoption of that law by the Congress, set forth in Section 1 of the Act. Among the specific "findings" therein set forth are the following:

(1) The denial of the right of employees to organize and the refusal to accept the procedure of collective bargaining leads to strikes which has the effect of burdening or obstructing commerce.

(2) The inequality of bargaining power between employees who do not possess full freedom of association substantially burdens and affects the flow of commerce.

(3) Protection by law of the right of employees to organize and bargain collectively safeguards commerce by removing certain recognized sources of industrial strife and unrest *"by encouraging practices fundamental to the friendly adjustment of industrial disputes."* (Emphasis supplied)

After making these basic findings the public policy sought to be served by the Act is then stated as follows:

"It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred *by encouraging the practice and procedure of collective bargaining* and by protecting the exercise by workers of full freedom of association, self-organization, and designation of

representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." (Emphasis supplied)

If, as contended by the petitioners, the conduct here engaged in by them is protected under Section 7 of the Act, then Section 7 is wholly inconsistent with the declared policy set forth in Section 1 of the Act. While Section 1 announces that it is the declared policy of the Act to eliminate obstructions to the free flow of commerce "by encouraging the practice and procedure of collective bargaining," Section 7, if construed as contended by the petitioners, would sanction and encourage planned intermittent work stoppages as a substitute for collective bargaining. We would then have the anomaly of an act, designed to avoid work stoppages through the encouragement and protection of collective bargaining, actually protecting work stoppages designed to avoid real collective bargaining.

The activities here engaged in were not in the nature of a "strike," carried on to enforce specific demands, after collective bargaining was exhausted and had broken down. They were in the nature of collective "bludgeoning" designed to reach a desired result without collective bargaining. The record in this case makes it abundantly clear that the work stoppages here engaged in were not "concerted activities for the purpose of collective bargaining," within the meaning of Section 7 of the Act, but mass action to avoid collective bargaining and in complete defiance of the authority of the employer to manage his business while remaining in the employer's service.

In *Home Beneficial Life Insurance Company v. N.L.R.B.*, 159 F. 2d 280 (4th CCA), the union announced

its own schedule of days on which certain employees would report for work. In that case, as in the instant case, the union representatives carefully avoided the use of the word "strike" in characterizing the concerted activities engaged in by the employees represented by the union. After these activities were engaged in, the union subsequently staged a genuine strike. The court, after holding that the original activity did not amount to a strike, dealt with the applicability of Section 7 of the National Labor Relations Act as follows:

"The statute, (Sec. 7), expressly recognizes the right of employees 'to engage in concerted activities' but does not and could not confer on them the right to engage en masse in unlawful activities, or, to defy the authority of the employer to manage his business while remaining in his service. When they engage in an unlawful sit-down strike, as in (citing *Pansteel* case), they may be discharged by an employer, even though he has been guilty of unfair labor practices and when, as here, they refuse to obey the rules laid down by a law-abiding management for the conduct of the business, they must be discharged and their places may be permanently filled." (p. 284) (Emphasis supplied)

In this connection, see also decision of the Circuit Court of Appeals for the 7th Circuit, in *C. G. Conn Limited v. National Labor Relations Board*, 108 F. 2d 390. In that case, as here, it was contended that the mere work stoppages were protected conduct under the National Labor Relations Act. In disposing of that contention, the court stated, among other things, the following:

"We are aware of no law or logic that gives the employee the right to work upon terms prescribed solely by him. That is plainly what was sought to be done in this instance. It is not a situation in which

employees *ceased* work in protest against conditions imposed by the employer, but one in which the employees sought and intended to continue work upon their own notion of the terms which should prevail. If they had a right to fix the hours of their employment, it would follow that a similar right existed by which they could prescribe all conditions and regulations affecting their employment." (p. 397) (Emphasis supplied).

In construing Section 7 of the Act, it should be borne in mind that, as stated in *Amalgamated Utility Workers v. Consolidated Edison Co.* (1940), 309 U.S. 261 262, 84 L. Ed. 738, Section 7 of the National Labor Relations Act created no new rights, and was merely definitive of rights already in existence.

Merely because a group of employees engage in a concert of activity, designed to force an employer to bow to their will, does not render such activity immune from regulation and control by the state under its police power. See *Allen-Bradley, Local 1111 v. W.E.R.B.* (1941) 315 U.S. 740, 86 L. Ed. 1154; *Hotel & R. E. Int. A. v. W.E.R.B.*, 315 U.S. 437, 86 L. Ed. 946. See also *N.L.R.B. v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 83 L. Ed. 627.

The work stoppages and walkouts here indulged in were part and parcel of what the petitioners conceive to be a new "tactic" or "weapon";—a "softening-up process." That the collective bargaining which is protected under Section 7 must be "without restraint or coercion," is made abundantly clear in the *Fansteel Metallurgical* case, *supra*.

Section 7 of the National Labor Relations Act is not different from, or inconsistent with, the provisions of the Wisconsin Employment Peace Act under which the

order of the Wisconsin Employment Relations Board was issued in this case.

Section 111.04 of the Wisconsin Statutes provides:

"Section 111.04. Employees shall have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection; and such employees shall also have the right to refrain from ~~any~~ or all of such activities."

As pointed out by counsel for respondent Wisconsin Employment Relations Board, both the Wisconsin Employment Peace Act and the National Labor Relations Act indicate clearly that both the Federal Government and State of Wisconsin are in agreement that labor relations should be governed by mutual responsibility on the part of employer, employees, and their representatives, and that all parties should have a reciprocal obligation to subordinate their own self-interest to the public welfare. Manifestly, the conduct of the petitioners here involved was not only contrary to the rights and best interests of the employer, but in complete disregard of the right of the public to have the collective bargaining process used in good faith with the employees at work producing vitally needed commodities in the public interest, and to stop work only if the collective bargaining process had failed, and a strike was engaged in to enforce the demands involved in the collective bargaining which preceded the strike.

In essence, the contention of the petitioners here is that, under Section 7 of the National Labor Relations Act, union officials have the untrammelled and fully protected right to stop plant operations at will and interfere with

production by arbitrarily calling out employees during regular working hours for the asserted purpose of calling union meetings. It is impossible to reconcile this contention with the declaration of policy set forth in Section 1 of the Act that the Act was enacted to eliminate "obstructions to the free flow of commerce" and for the purpose of "encouraging the practice and procedure of collective bargaining."

If the tactics here employed are to be given judicial sanction, it would be tantamount to opening up a veritable "Pandora's Box,"—the evil effects of which could hardly be over-estimated. If the employees engaging in such tactics are to be cloaked with the same protection afforded striking employees, we respectfully submit that it would make a travesty of the declaration in Section 1 that the law was enacted for the purpose of "encouraging the practice and procedure of collective bargaining."

Under the Labor-Management Relations Act of 1947, unions are under precisely the same collective bargaining obligation which is applicable to employers. See Sections 8(a)(5) and 8(b)(3). If, then, the tactics here employed by the unions is held to be permissible under the Act, would not a similar tactic resorted to by employers be entitled to similar immunity?

Could anyone seriously contend that the sanctioning of such tactics would be consistent with the purpose of the Act to have uninterrupted production and to eliminate obstructions to the free flow of commerce? Instead, it would assure the very interruption of production which the Act was designed to prevent. Instead of encouraging the utilization of free collective bargaining, the sanctioning of the tactic here involved would make collective bargaining, in any real sense, an impossibility.

Collective bargaining can work only when engaged in by relative equals in an atmosphere free from force and duress. If this is true, the sanctioning of the tactic here engaged in would have the effect of eliminating the very essentials of collective bargaining. Collective "bludgeoning" would soon replace collective "bargaining." "Negotiations" between unions and employers would then in fact be trials by *combat*.

We cannot believe that such a result is in the public interest, or consistent with the congressional declaration contained in Section 1 of the National Labor Relations Act. As pointed out in *N.L.R.B. v. Draper Corp.*, 145 F. 2d 199, at p. 203,—

"The purpose of the act was not to guarantee to employees the right to do as they please but to guarantee to them the right of collective bargaining for the purpose of preserving industrial peace."

It is perfectly clear that the tactic here employed is a particularly harmful and demoralizing weapon, the necessary effect of which is to burden and obstruct commerce and to destroy the collective bargaining which it is the purpose of the Act to promote.

POINT 2

If Section 7 of the National Labor Relations Act were construed as rendering immune the conduct here engaged in, said section would be invalid under the due process provision of the Fifth Amendment of the Constitution of the United States.

Industry cannot function and employers cannot operate their plants properly unless they have reasonable control over their production schedules. They cannot have this

control if, when their plants are in operation, the employees are free to collectively stop and start their work at will. Production cannot be started and stopped the way you start and stop the flow of water by merely turning a faucet. Industrial plants must be either at work or shut down.

If the tactic here involved has special statutory immunity, employees can walk into the plant at the opening of a shift, walk out about 15 minutes thereafter, return about one-half hour later, and continue that process with such modifications as the employees themselves, or the union representing them, might determine. It will be readily seen that complete loss of functional use of the employer's property would soon result, production schedules and filling of orders placed by customers would be mere pious hopes, and industrial chaos would be inevitable.

If, as petitioners contend, the tactic here employed is within the protection of Section 7 of the National Labor Relations Act, the constitutional right to conduct a lawful business in a lawful manner will have no further substance or reality. Then, in truth, the "right" of an employer to conduct his business will no longer be a vested right, but will be only by sufferance, and without any remedy against the usurpation of the control of his business by others. In the consideration of such a result, we refer to the statement of Chief Justice Marshall in *Marbury v. Madison*, 1 Cranch 137, 163, where he said:

"The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of vested rights."

See also *Truax v. Corrigan*, 257 U.S. 312, 66 L. Ed. 254, where this court stated:

"To give operation to a statute whereby serious losses inflicted by such unlawful means are in effect made remediless, is, we think, to disregard fundamental rights of liberty and property and to deprive the person suffering the loss of due process of law."

We fully recognize the legitimate rights of employees and of the unions which represent them. In the last analysis, however, those rights are subject to the familiar maxim: "*Sic utere tuo ut alienum non laedas*,"—So use your own property as not to injure the rights of another. This was clearly stated by this court in *Hitchman Coal & Coke v. Mitchell*, 245 U.S. 229, 253-254, 62 L. Ed. 260:

"Defendants set up, by way of justification or excuse, the right of workmen to form unions, and to enlarge their membership by inviting other workmen to join. The right is freely conceded, provided the objects of the union be proper and legitimate, which we assume to be true, in a general sense, with respect to the union here in question. * * * The cardinal error of defendants' position lies in the assumption that the right is so absolute that it may be exercised under any circumstances and without any qualification; whereas in truth, like other rights that exist in civilized society, it must always be exercised with reasonable regard for the conflicting rights of others. (citing cases) The familiar maxim '*Sic utere tuo ut alienum non laedas*'—literally translated, 'So use your own property as not to injure that of another person,' but by more proper interpretation, 'so as not to injure *the rights of another*' * * *—applies to conflicting rights of every description. For example, where two or more persons are entitled to use the same road or passage, each one, in using it, is under a duty to exercise care not to interfere with its use by the others, or to damage them while they are using it."

Some observations as to the relationship of employers and employees and unions and the general public which this appeal brings to this court, we think, may well be made at this time.

It seems to us that in the construction of the National Labor Relations Act, contended for by the petitioners, we have clearly reached the point where "one man's liberty ends where another's begins."

The facts in the case call for the application of the rule of all human conduct, "FAIR PLAY." Beginning with the Federal Constitution, the rule of "fair play," as understood by right-thinking people, was followed in the legislative history of Congress and the state legislatures, and in the judicial development of this country.

This would cease to be so if the construction of the National Labor Relations Act contended for by petitioners were adopted, and held to be constitutionally valid. If that construction were adopted and held valid, in the very nature of things, a devastating condition would result through the placing in the hands of organized labor of an instrument for the destruction of rights, not called for by statutory construction, not supported by any realistic concept of constitutional law, not within any declared public policy, and certainly not in keeping with any responsible theory of "fair play."

In the hands of unthinking and wilful men, under the guise of right, it could well mean industrial stagnation and complete demoralization. This would be so because it would give the unions the potential right to bring about a condition in which the owners of plants in the last analysis would own brick and mortar, idle machinery and equipment, and a useless good will. Manifestly, our economic life could no longer be maintained under such conditions.

While we are dealing here with the Fifth Amendment to the Constitution, which is applicable only to the Federal government, the "due process" provision is analogous to the "due process" provision contained in the Fourteenth Amendment applicable to the several states. Accordingly, the various decisions throwing light upon the significance of the "due process" provision in the Fourteenth Amendment are of interest here. Particularly pertinent here is the observation by Mr. Chief Justice Taft in *Truax v. Corrigan*, *supra*.

"It is argued that while the right to conduct a lawful business is property, the conditions surrounding that business, such as regulations of the state for maintaining peace, good order, and protection against disorder, are matters in which no person has a vested right. The conclusion to which this inevitably leads in this case is that the state may withdraw all protection to a property right by civil or criminal action for its wrongful injury, if the injury is not caused by violence. * * * It is true that no one has a vested right in any particular rule of the common law, but it is also true that the legislative power of a state can only be exerted in subordination to the fundamental principles of right and justice which the guaranty of due process in the 14th Amendment is intended to preserve, and that a purely arbitrary or capricious exercise of that power, whereby a wrongful and highly injurious invasion of property rights, as here, is practically sanctioned and the owner stripped of all real remedy, is wholly at variance with those principles." (Emphasis supplied) (pp. 329-330)

In *New State Ice Co. v. Liebmann*, 285 U.S. 262, 278, 76 L. Ed. 747, this court said:

"Plainly, a regulation which has the effect of denying or unreasonably curtailing the common right to engage in a lawful private business, such as that un-

der review, cannot be upheld consistent with the 14th amendment. Under that amendment, nothing is more clearly settled than that it is beyond the power of a state, 'under the guise of protecting the public, arbitrarily (to) interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.'"

In *Liggett Co. v. Baldrige*, 278 U.S. 105, 73 L. Ed. 204, this court said, at p. 113:

"A state cannot, 'under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.'"

See also:

Butchers' Union Slaughter House and Live Stock Landing Company v. Crescent City Live Stock Landing and Slaughter-House Company, 111 U. S. 746, 764-765, 28 L. Ed. 585.

Burns Baking Co. v. Bryan, 264 U.S. 504, 68 L. Ed. 813, 32 A.L.R. 661.

In the view which we take of the constitutional issues here involved, we assert, as did the court in *The Oakmar*, D.C. Md., 2 F. Supp. 550:

"Labor and capital, employer and employee, stand upon the same basis before a Federal Court, with respect to constitutional rights."

CONCLUSION

It is the primary contention of the Employers Association of Milwaukee that the conduct here involved, which was proscribed by the order of the Wisconsin Employment Relations Board, not only does not conflict with Section 7 of the National Labor Relations Act, but is in

furtherance of the public policy sought to be served by it. If, however, the statute is construed as contended by the petitioners here, it is our position that Section 7 of the National Labor Relations Act must fall because it is in conflict with the due process provision of the Fifth Amendment of the Federal Constitution.

Accordingly, the decision of the Supreme Court of the State of Wisconsin should be affirmed.

Respectfully submitted,

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**In The
SUPREME COURT OF THE UNITED STATES**

October Term, 1948

No. 14

**INTERNATIONAL UNION, U. A. W. A., A. F. of L.,
LOCAL 232, ET AL., PETITIONERS,**

V.

**WISCONSIN EMPLOYMENT RELATIONS BOARD,
ET AL.**

No. 15

**INTERNATIONAL UNION, U. A. W. A., A. F. of L.,
LOCAL 232, ET AL., PETITIONERS,**

V.

**WISCONSIN EMPLOYMENT RELATIONS BOARD,
ET AL.**

BRIEF FOR THE STATES AS AMICI CURIAE

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INDEX

Subject Index

	Page
Statement -----	1
Argument -----	3
Argument No. I:	
Congress has under the Constitution, as interpreted by the Supreme Court of the United States, the right to regulate matters which affect interstate commerce -----	3
Argument No. II:	
The scope of the Labor Management Relations Act, 1947, relating to "unfair practices" only applies when interstate commerce is affected --	4
Argument No. III:	
Not only do the states have authority to regulate the activities here as part of their police power, but the Labor Management Relations Act in various sections indicates that states authority to control these activities is left untouched -----	9
Argument No. IV:	
Regulation of the unfair practices here involved do not interfere with the purposes and objectives of the Labor Management Relations Act --	11
Conclusion -----	13
Appendix A -----	15

Cases Cited

Allen-Bradley Local v. Wisconsin Employment Relations Board, 315 U. S. 740, 86 L. Ed. 1154 --	8, 9
---	------

INDEX—(continued)

	Page
Clason v. Indiana, 306 U. S. 439, 83 L. Ed. 858 -----	6
Cloverleaf Butter Co. v. Patterson, 315 U. S. 148, 86 L. Ed. 754 -----	6, 8
Duckworth v. Arkansas, 314 U. S. 390, 86 L. Ed. 294 -----	13
National Labor Relations Board v. Jones & Laughlin Steel Corporation, 301 U. S. 1, 81 L. Ed. 893 -----	3
Parker v. Brown, 317 U. S. 341, 87 L. Ed. 315 -----	7
Schecter Poultry Corporation v. U. S., 295 U. S. 495, 79 L. Ed. 1570 -----	5
Southern Pacific Co. v. Arizona, 325 U. S. 761, 89 L. Ed. 1915 -----	8
Wisconsin Employment Relations Board v. Allis- Chalmers Workers' Union, 249 Wis. 590, 25 N. W. (2d) 425 -----	3

Statutes Cited

Section 13, Labor Management Relations Act, 1947. --	10
Section 10, Labor Management Relations Act, 1947 --	4, 8
Section 10(a), Labor Management Relations Act, 1947 -----	9, 10
Section 8(a), Labor Management Relations Act, 1947 -----	12
Section 8(b), Labor Management Relations Act, 1947 -----	5, 6, 9
Section 111.01, Wisconsin Statutes -----	7

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STATEMENT.

This brief is submitted by the several states pursuant to the permission granted by Rule 27 (9) of the rules of this Court.

The questions presented are set forth in appellees' brief as follows:

1. Does an order of a state board violate constitutional provisions relating to involuntary servitude, freedom of assembly, and freedom of speech, by prohibiting the petitioners from inducing a concerted program of repeated absences from work of a few hours' duration each during regularly scheduled working hours without giving advance notice to the employer and without leave, where such absences are for the announced purpose of attending union meetings but are for the real purpose of interfering with production so as to exert pressure upon the employer to accede to demands made or to be made in the process of collective bargaining?

2. Does such order violate the commerce clause of the Constitution (a) by intruding upon a field prohibited to states by congressional enactment; or (b) by depriving the petitioners of any rights guaranteed to them by congressional enactment?

These questions are of vital importance to every state of the Union and, as Attorneys General of our respective states, we deem it our duty to our states and to this Court to present this brief which will be devoted to argument upholding the rights which the states possess under the Constitution, and to those rights which still obtain under the Labor Management Relations Act, 1947.

ARGUMENT.

I.

Congress Has Under the Constitution, as Interpreted by the Supreme Court of the United States, the Right to Regulate Matters Which Affect Interstate Commerce.

We concede the fact that Congress has the authority under the commerce power of the Constitution to regulate labor relations when such relations have an effect upon interstate commerce. The Supreme Court of Wisconsin pointed out in the case of *Wisconsin Employment Relations Board v. Allis-Chalmers Workers' Union*, 249 Wis. 590, 25 N. W. (2d) 425, in reference to the National Labor Relations Act as follows:

"The power of the National Labor Relations Board to initiate proceedings in labor relations affecting interstate commerce was necessary in view of the source and scope of federal powers to deal with the subject of labor. The National Labor Relations Act is not an exercise of police power. The power of congress to deal with the subject has its source in the commerce clause of the constitution, U. S. Const. Art. 1, Sec. 8, cl. 3, and the purpose of the act was to prevent such unfair labor practices as proximately affect interstate commerce. * * *

This power applies even though the business may be entirely an intrastate business but its activities affect interstate commerce. This Court pointed out in *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U. S. 1, 81 L. Ed. 893:

"* * * Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropri-

ate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control. * * *

II.

The Scope of the Labor Management Relations Act, 1947; Relating to "Unfair Practices" Only Applies When Interstate Commerce is Affected.

Since the Labor Management Relations Act, 1947, was enacted subsequent to the time the litigation at hand originated, the rights of the respective parties must be determined in the light of that act. In determining what rights the state has, we, like the State of Wisconsin, are interested in two jurisdictional problems:

(1) The authority of the Wisconsin Employment Relations Board to regulate, under Wisconsin statutes, the activity of the union in causing frequent work stoppages and slow-down tactics to be effected.

(2) The authority of the Wisconsin Employment Relations Board to regulate, under Wisconsin statutes, the activities of employees in coercing and intimidating other workmen in order to secure union demands.

The applicable portion of Section 10 of the Labor Management Relations Act, 1947, reads as follows:

"The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *

This does not give the board authority to regulate any and all unfair practices but only those which affect inter-

state commerce. As this Court held in *Schechter Poultry Corporation v. U. S.*, 295 U. S. 495, 79 L. Ed. 1570:

"In determining how far the Federal Government may go in controlling intrastate transactions upon the ground that they 'affect' interstate commerce, there is a necessary and well established distinction between direct and indirect effects. The precise line can be drawn only as individual cases arise, but the distinction is clear in principle. * * *"

It is clear then that if the practices complained of here "affect" interstate commerce then Congress could well regulate such activities. Congress did choose to regulate certain unfair practices in Section 8 (b) applied to labor organizations. For convenience, Section 8 (b) is set forth in "Appendix A" but summarizing, these provisions make it an unfair labor practice to coerce employees or restrain them in their right to self-organization, to bargain collectively and engage in concerted activities for mutual aid or protection, or their right to refrain from such activities.

Section 8 (b) (4) also forbids unfair practices in relation to strikes or concerted refusals to use, manufacture, process, or handle goods when certain illegal objectives are in mind. These illegal objectives include (1) forcing employers or self-employed to join a labor organization or to cease using and handling the products of another producer or manufacturer, (2) forcing any employer to bargain with a labor organization when it has not been certified as representative of the employees under the act, or forcing any employer to bargain if another organization has been certified, (3) forcing any employer to assign work to employees of one labor organization as against another labor organization unless the employer is failing to conform to an order of the Board determining

the bargaining representative for employees performing such work.

Considering our first problem at hand which is the authority of the state board to regulate slow-downs and work stoppages, we note that Section 8 (b) does not cover such activity. Section 8 (b) (4) is the only unfair practice which comes near being similar to the practice at hand. It is clear that the unfair objectives listed in Section 8 (b) (4) were not any of the objectives of the union in the case at hand. As disclosed by the record (R. 46,47) the objective was one in which the union attempted to put economic pressure on the company without striking. Now certainly it will appear that the Federal Labor Board cannot interfere with such activities if the activity is not prohibited, but this does not mean that a state cannot regulate such activity.

"* * * It has long been recognized that in those fields of commerce where national uniformity is not essential, either the state or federal government may act. * * * Where this power to legislate exists, it often happens that there is only a partial exercise of that power by the federal government. In such cases the state may legislate freely upon those phases of the commerce which are left unregulated by the nation. * * *"

Cloverleaf Butter Co. v. Patterson, 315 U. S. 148, 86 L. Ed. 754.

"There is no suggestion of conflict with a Federal enactment. The mere power of the Federal Government to regulate interstate commerce does not disable the States from adopting reasonable measures designed to secure the health and comfort of their people. * * *"

Clason v. Indiana, 306 U. S. 439, 83 L. Ed. 858.

"* * * This Court has repeatedly held that the grant of power to Congress by the Commerce Clause did not wholly withdraw from the states the authority to regulate the commerce with respect to matters of local concern, on which Congress has not spoken. * * *"

Parker v. Brown, 317 U. S. 341, 87 L. Ed. 315.

The union was not striking as they themselves state that they wanted to avoid such a hardship. The Wisconsin legislature in its wisdom also wanted to avoid hardship on the part of the public and the employer. Wisconsin statute, Sec. 111.01, reads:

"The public policy of the State as to employment relations and collective bargaining, in the furtherance of which this subchapter is enacted, is declared to be as follows:

"(1) It recognizes that there are three major interests involved, namely: That of the public, the employee, and the employer. These three interests are to a considerable extent interrelated. It is the policy of the state to protect and promote each of these interests with due regard to the situation and to the rights of the others."

The Wisconsin Legislature recognized economic pressure by means of a legitimate strike as a fair labor weapon, but the state would not permit each and every harrassing endeavor on the part of the unions. The demands of both employer and employee must be considered in the light of the rights of the public generally.

Even if the Federal Labor Board did have power over such activity it could act only if interstate commerce is affected. And this, of course, leaves the states free to control such activities as part of their police power when interstate commerce is not affected. This court held in

the *Allen-Bradley Local v. Wisconsin Employment Relations Board* case, 315 U. S. 740, 86 L. Ed. 1154, that the board's order declaring it an unfair labor practice under Wisconsin statutes for an employer to coerce or intimidate an employee in the enjoyment of his legal rights was valid and not unconstitutional and void as to the provisions of the National Labor Relations Act. In the instant case it is not shown that interstate commerce is affected and, therefore, this case is much the same as *Allen-Bradley v. Wisconsin Employment Relations Board*, supra, since this essential fact giving the Federal board jurisdiction is not shown. The Labor Management Relations Act requires by Section 10 (b) that the Federal board can act "Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice * * *." Thus we see the Federal board is quite limited in its activity as a charge must first be brought before it can act and certainly Congress did not intend in such a situation to prohibit state action where needed.

"When the prohibition of state action is not specific but inferable from the scope and purpose of the federal legislation, it must be clear that the federal provisions are inconsistent with those of the state to justify the thwarting of state regulation."

Cloverleaf Butter Co. v. Patterson, 315 U. S. 148, 86 L. Ed. 754.

"Congress, in enacting legislation within its constitutional authority over interstate commerce, will not be deemed to have intended to strike down a state statute designed to protect the health and safety of the public unless its purpose to do so is clearly manifested * * *."

Southern Pacific Co. v. Arizona, 325 U. S. 761, 89 L. Ed. 1915.

The Labor Management Relations Act does not contain words of such specific nature as to supersede the Wisconsin state regulation by Federal regulation.

As to the second problem concerning intimidation and coercion of fellow employees, we see the Labor Management Relations Act in Section 8 (b) (1) and Section 7 does enter the field involved here. However, once again the Federal Labor Board can only enter the field when it is charged and shown that interstate commerce is affected. In this instance the disturbances are so remote that interstate commerce is not affected, but still some control is desirable, and it is submitted that it is well within the police power of the state to control such activity. (Note reference above to *Allen-Bradley Local v. Wisconsin Employment Relations Board*, 315 U. S. 740, 86 L. Ed. 1154).

III.

Not Only do the States Have Authority to Regulate the Activities Here Involved as Part of Their Police Power, But the Labor Management Relations Act in Various Sections Indicates that States Authority to Control These Activities is Left Untouched.

Section 10 (a) reads as follows:

"The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: PROVIDED, that the Board is empowered by agreement with any agency of any State or territory to cede to such agency jurisdiction over

any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith."

The second sentence of Section 10 (a) indicates that Congress did intend state action. Note that the Federal Board's jurisdiction is not affected by any other means of "adjustment or prevention that has been or *may be* established by agreement, law, or otherwise." The authority of the Federal Board to handle unfair labor practices of course only applies to practices listed in Section 8. In other words, the Federal Board's jurisdiction is supreme as far as unfair practices listed in Section 8 are concerned, but the words "may be established by agreement, law, or otherwise" certainly admits limitations on unfair practices by state labor boards pursuant to state law.

Section 13 reads as follows:

"Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

The important part of this section is the phrase "or to affect the limitations or qualifications on that right." The words have some meaning or they would not be included, and it is clear that it is state qualifications on the right to strike which the act does not interfere with.

This must be true because to read it as applying to Federal limitations would be redundant, inasmuch as "except as specifically provided for herein" already covers all the possible federal limitations. Then what "limitations" are left? The state's limitations, of course. To construe the section any other way does not make either good English or good sense.

Section 14 (b) expressly acknowledges state jurisdiction over union security provisions, so that states have the last word in either permitting or not permitting security agreements.

It will be admitted by all that the Labor Management Relations Act is not as explicit as it might be in defining jurisdiction of the Federal Board. However, this Court should never give any more jurisdiction than is specifically called for because if Congress wished to occupy the field they could do so in specific language, and absence of such language certainly discourages any indication of Federal pre-emption.

IV.

Regulation of the Unfair Practices Here Involved Do Not Interfere With the Purposes and Objectives of the Labor Management Relations Act.

Section 7 guarantees that: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any and all of such activities

except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3)." The order of the state board does not interfere with employee's rights enumerated above. The right to engage in concerted activities for mutual aid or protection is a qualified right in that only reasonable steps can be taken. This does not sanction a riot, or lynching party. Just as the federal government can control intrastate activities on the fact it may "affect" interstate commerce, so the states can control the right to strike so as to keep it peaceable and within bounds as part of their police power. The state board by its order does not forbid a strike but it does seek to prohibit any and all harassing activities that are illegal under Wisconsin law. Furthermore, the objectives of the federal act only apply when interstate activities are affected, so that the states should not be hampered in their police activity until active federal control of the problem has been taken. It is conceded then that the state's power is limited, but until the federal board has taken jurisdiction and shown that interstate commerce is affected by the unfair practices, the power of the state to regulate these activities is not limited.

"While the commerce clause has been interpreted as reserving to Congress the power to regulate interstate commerce in matters of national importance, that has never been deemed to exclude the states from regulating matters primarily of local concern with respect to which Congress has not exercised its power, even though the regulation has some effect on interstate commerce. As we had occasion to point out at the last term of Court, there are many matters which are appropriate subjects of regula-

tion in the interest of the safety, health and well-being of local communities which, because of their local character and their number and diversity and because of the practical difficulties involved, may never be adequately dealt with by Congress. Because of their local character also there is wide scope for local regulation without impairing the uniformity of control over the commerce in matters of national concern and without materially obstructing the free flow of commerce, which were the principal objects sought to be secured by the commerce clause. Such regulations, in the absence of supervening Congressional action, have for the most part been sustained by this Court notwithstanding the commerce clause. * * *

Duckworth v. Arkansas, 314 U. S. 390; 86 L. Ed. 294.

Section 501 (2) defines "strike" as including slow-downs or concerted stoppages of work, but this right is not guaranteed in Section 7 so the presumption is that this is not an unlimited right given to employees. This is made even clearer by Section 13 which we discussed before. This section states that there are no federal limitations "except as provided for herein" to interfere with the right to strike or to effect the limitations on that right. This we pointed out must apply to state limitations or it would be included among the exceptions "specifically provided for herein."

CONCLUSION.

Section 1 of the Act gives the general purposes of the Act. It may be summed up as having the objective of promoting industrial peace under law. To achieve peace in industry we ought to as lawyers be able to first show

coordinated government regulation. When forces of government cannot cooperate under law it is hard to expect the forces of industry to cooperate. This means that the best and most efficient way to regulate labor practices should be jealously sought over jurisdiction and power. Distributed authority among the states to handle minor problems is superior to complete federal domination because local administration can acquaint itself with local problems. If the jurisdiction of the Federal Board is invoked only when interstate commerce is affected and states can handle most problems before they become acute, then the Federal Board can concentrate on the important nationwide problems. This method is in keeping with the intention of the 10th Amendment which had the purpose of keeping power at home and only giving it to Congress and the Federal government as enumerated in the Constitution. Should labor problems assume the place where complete federal domination is desirable then the Constitution should be changed. In the light of the opinions of this Court and the limiting words of our Constitution, we submit that the Wisconsin Employment Relations Board did have the authority and jurisdiction to give the orders it gave in limiting the activities of the union here involved.

Respectfully submitted,

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APPENDIX A

Section 8 (b) reads as follows:

"It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: PROVIDED, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

"(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9 (a);

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer,

or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9; (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: PROVIDED, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act;

"(5) to require of employees covered by an agreement authorized under subsection (a) (3) the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected; and

"(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed."

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In The
SUPREME COURT OF THE UNITED STATES

October Term, 1948 Numbers 14 and 15

INTERNATIONAL UNION, UNITED AUTOMOBILE
WORKERS OF AMERICA, A. F. of L., LOCAL 232;
ANTHONY DORIA, CLIFFORD MATCHEY, WAL-
TER BERGER, ERWIN FLEISCHER, JOHN M. COR-
BETT, OLIVER DOSTALER, CLARENCE EHRLMANN,
HERBERT JACOBSEN, LOUIS LASS,

Petitioners,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E.
GOODING, HENRY RULE and J. E. FITZGIBBON, as
Members of the Wisconsin Employment Relations Board;
and BRIGGS & STRATTON CORPORATION, a Corpora-
tion,

Respondents.

Brief of
Wisconsin State Industrial Union Council.
(As Amicus Curiae)

MAX RASKIN,
Attorney for
Wisconsin State Industrial Union Council.

I N D E X .

	Page
Statement of Jurisdiction	2
Argument	3

Cases Cited:

Journeyman Tailors' Case, 8 Mod. 11 (Eng. 1721)	12
People vs. Fisher, 14 Wend. (N. Y.) 9, 28 Am. Dec. 501	12, 13, 17

Statutes Cited

Constitution of the United States:	
Article I, Sec. 8	8
Article VI, Amendments 13 and 14	8
Wisconsin Constitution:	
Art. 1, Sections 1-2-4-22	7, 8, 14
Wisconsin Statutes (1945):	
Sec. 111.06(2)(e) and (h)	6, 8, 9
English Law:	
53 George III, Chapter 40	12

Miscellaneous Authorities Cited:

Documentary History of American Industrial Society, Volumes 3 and 4	12
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THE OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of the State of Wis-
consin is reported in 250 Wis. 550, 27 N. W. (2) 875 (R.
106-121).

JURISDICTION.

Because the judgment of the Supreme Court of Wisconsin, filed in this action, has such far reaching implications and is of such great importance to all workingmen, organized or unorganized, the Wisconsin State Industrial Union Council respectfully submits this brief as *amicus curiae*.

The Federal question of whether the Wisconsin Statutes in question and the order and judgment purportedly based on such statutes violated the Constitution of the United States thus was raised before every tribunal before which argument was heard.

The Supreme Court of the State of Wisconsin specifically held that neither the Wisconsin Statutes nor the order based on such statutes, as construed, deprive the petitioners of any rights guaranteed under the provisions of the Constitution of the United States.

The Wisconsin Supreme Court has taken the position that mere work stoppages in connection with a labor dispute, but not associated with any violence, boycotting, or picketing, are validly restrained by the order and judgment herein; that such restraints are supported by the provisions of Chapter 111, Wisconsin Statutes 1945, and that the question of the violation of constitutional guarantees alleged by the petitioners to have been breached by the order should be determined adversely to the petitioners.

ARGUMENT.

The issue involved is clearly stated in the opinion of the Wisconsin Supreme Court, 250 Wis. 550, at page 553. We can do no better than to quote:

"The evidentiary facts are not in dispute. The Briggs & Stratton Corporation was engaged in manufacturing and operating two plants. A contract between the union and the company had expired. The union was the representative of the employees for the purpose of collective bargaining. Collective bargaining was in process to fix the terms of a new contract. During such bargaining both plants were in operation. While so in operation the employees of the company at the instance of the union and its officers had by concerted action while at work stopped work during their scheduled working hours and remained away until their next scheduled hour for commencement of work. The work was conducted by two shifts. The day shift quit work during their working hours and stayed away until the following morning and then resumed work. The night shift on these occasions when the day shift quit work failed to appear for work during their scheduled hour for work the night of that day and returned for and resumed work at their scheduled hour for commencing work on the next night. The total number of these instances was twenty-seven. In each instance the employees of the shift left in an orderly manner and went directly to attend a union meeting off the premises previously ordered by the union. These meetings were called by certain

of the defendants as officers or committees of the union at irregular times. No advance notice of the meetings was given to either the company or the employees because it was considered that without any notice the stoppages would most lessen production and effect injury on the company. The times were fixed without any other reason or purpose. The employees were told to go forthwith and went as told. The action of the employees was a concerted effort to, and did, interfere with production and was taken as economic pressure to compel the company to comply with the union's demands respecting the terms of the contract being negotiated. It was a concerted action taken for the purpose of interfering with production and it so operated."

The order of the Wisconsin Employment Relations Board, adopted and ordered enforced by the judgment of the Wisconsin Supreme Court, reads as follows:

"(a) Engaging in any concerted efforts to interfere with production by arbitrarily calling union meetings and inducing work stoppages during regularly scheduled working hours or engaging in any other concerted effort to interfere with production of the complainant except by leaving the premises in an orderly manner for the purpose of going on strike."

The judgment in this case holding that the concerted stopping of work and leaving the premises of an employer, is an unfair labor practice, merely because it interferes with production, is, we respectfully submit, a very dangerous doctrine.

which that power may be used. The mere fact that that power exists and may be used *is the most important factor in preserving industrial peace.*

If that economic power of concerted quitting is left intact, *even though it may never be used*, employers are compelled to give some heed to the workman's demand for a decent living wage and decent working conditions.

CONCLUSION.

Acting in concert is the only possible way under present economic conditions, for workmen to put their price on their labor.

No man can be free, as we in America understand freedom, if he cannot sell his labor at his own price, determined by fair and equal bargaining.

No man can be a free workman if he is compelled to work even though dissatisfied with his wage, despite his theoretical, but wholly illusive, right to quit as an individual.

Even though it would be an easy matter to analyze and distinguish from our present problem, the cases cited in other briefs, we have not done so, because we believe that the basic theory of this judgment is in itself a violation of not only the Federal and State Constitutions, but also a perversion of American tradition.

Respectfully submitted,

MAX RASKIN,

Amicus Curiae.

The inalienable right of a man to work or not to work for a given employer is, by this judgment, completely abrogated.

The concomitant, inalienable right to put his own price on his labor is seriously interfered with.

The only method a workingman has to secure the value he places upon his labor is by refraining from selling it below that value.

The concerted action of groups of workers to maintain and secure the price for which they are willing to exchange their labor is now universally accepted.

The concerted quitting of work for the purpose of compelling the employer, by the economic pressure thus exerted, to pay the value of the services determined by the giver of such services, is the only bargaining power the workingman has.

To say that the workers may quit in concert for a period of a week, or a month, or a year, and be within the law, and to deny them the right to quit their work for one day, we respectfully submit is a novel doctrine.

When there is a dispute between an employer and his employees as to the value of the services or the conditions under which such services are to be rendered, a very serious situation presents itself.

The employer has it within his power to close down his plant and place all of his employees in an economic position which can result in misery and semi-starvation. On the other hand the employees can refuse to work and thus close down the employer's plant and destroy his profits.

Neither the employers nor employees wish to prolong a dispute until the above described conditions result.

Every labor dispute is finally settled on a give and take policy. If the courts interfere with the right of employees to leave their employer either singly or in concert, when they are dissatisfied with the conditions offered them, the only method of the workers to attain their demands is destroyed.

To interpret Section 111.06(2)(h) of the Wisconsin Statutes to mean that the concerted stopping of work and leaving the premises of the employer constitutes an unfair labor practice seems to us to be a perversion of the meaning of the section. The only stoppage or slow-down of work prohibited by Section 111.06(2)(h) is to interfere with production *on the premises* of the employer:

The section reads:

"(h) To take unauthorized possession of property of the employer or to engage in any concerted effort to interfere with production except by leaving the premises in an orderly manner for the purpose of going on strike."

The Employment Peace Act, Chapter 111 of the Wisconsin Statutes, does not provide that a secret ballot must be taken to call a strike. The section provides merely that no overt concomitant of a strike shall be engaged in.

Section 111.06(2)(e) reads:

"To co-operate in engaging in, promoting or inducing picketing (not constituting an exercise of constitutionally guaranteed free speech), boycott-

ting or any other overt concomitant of a strike unless a majority in a collective bargaining unit of the employees of an employer against whom such acts are primarily directed have voted by secret ballot to call a strike."

There is no prohibition in the law of the State of Wisconsin or the United States of America for the quitting in concert of the employees of any employer. The holding of a secret election is merely for the purpose of protecting their rights to picket and patrol and engage in the other concomitants of a strike.

• The problem involved in this judgment is too fundamental to be solved by refined definitions or legal quibbling.

Section 22, Article 1, Wisconsin Constitution reads:

"The blessings of a free government can only be maintained by a firm adherence to justice, moderation, temperance, frugality and virtue, and by frequent recurrence to fundamental principles."

Some of these fundamental principles are detailed in Article 1.

Sec. 1, Article 1, reads:

"All men are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed."

Section 2, Article 1, reads:

"There shall be neither slavery, nor involuntary servitude in this state, otherwise than for the punishment of crime, whereof the party shall have been duly convicted."

Sec. 4, Article 1, reads:

"The right of the people peaceably to assemble, to consult for the common good, and to petition the government, or any department thereof, shall never be abridged."

We respectfully submit that not only the provisions of Sec. 111.06(2)(e)(h) as construed, but the underlying theory of which this judgment is the fruit, violates each and every one of the above quoted sections of the Wisconsin Constitution and Article I, Section 8 and Article VI and the Thirteenth and Fourteenth Amendments of the Constitution of the United States.

The theory referred to clearly appears in the opinion of the Wisconsin Supreme Court, page 560:

"From the above we think it clearly follows that the employees did not engage in the stoppage of work involved for the purpose of 'going on strike' and that the concerted effort to interfere with production constituted an unfair labor practice under par. (h) of sec. 111.06(2), Stats. The union and the individual defendants caused the walkouts and the refraining from work for the purpose of interfering with production above quoted and under sec. 111.06(3) they were all guilty of an un-

fair labor practice whether they in fact were among the employees who did those things or not."

It was upon this theory and its inevitable extension that the National Socialists of Germany and the Communists of Soviet Russia, based and built an economic and political system diametrically opposed to our Constitutional Government.

Baldly stated the most sacred individual rights are subordinate to the State, and are subject to complete extinction.

We used the term "State". The Germans called it the "Fatherland Reich"; the Russians call it the "good of the masses."

The term used means nothing. It is the destruction of individual rights that results inevitably from the acceptance of this theory that has meaning.

We are not going to engage in any refined definitions of what constitutes a strike.

If two or three or a thousand or ten thousand employees are dissatisfied with their wages or working conditions, they are prohibited from stopping work in concert. They are compelled to continue selling their labor below the price they set on it.

It is sheer nonsense to argue that Section 111.06(2) guarantees each individual the right to quit his job.

If there is one concept in labor relations that is fully and completely accepted in the United States, it is that the individual employee can in no real sense bargain in the Labor market. It is only by acting in concert that employees even approach equality with employers in the wage bargain.

The Court will note that the Constitution reads:

"There shall be neither slavery, nor involuntary servitude * * * "

A clear distinction is made between "slavery" which was then well known, and service against the will.

Involuntary servitude does not necessarily require physical compulsion. An overseer with a black snake whip. Chains and leg irons. Bloodhounds and shotguns.

It is idle to argue that the extent of the curtailment of an individual's rights is determined by the construction of the law as applied in a particular case.

The language is too plain and unambiguous to need any construction.

The employees acting in concert are prohibited from causing any work stoppage. That means in the plainest of English prohibited from quitting their jobs.

The matter involved herein is too fundamentally important to be covered by verbal screens.

This Act violates Sec. 4, Const. in that it prohibits the rights of these employees "to consult for the common good."

They are prohibited from acting in concert. They cannot consult for their common good, if the consultation results in a recognition of a common dissatisfaction with wages and working conditions.

Of course, they can meet together (but not if they must quit work to do so) and discuss their trials and tribulations, but their activity is limited to mutual consolation.

Do the words of the Constitution "consult for the common good" merely mean they can meet and weep on each other's shoulders?

We must not confuse the issue in arguing that limitation on the right to strike has been upheld by the courts.

Limitation and regulation are far different than prohibition.

Of course the right to strike has been regulated and in some instances limited.

The present Federal Management and Labor Law, commonly known as the Taft-Hartley Law, regulates and limits strikes. But it does not prohibit them completely. Nor does it prohibit quitting in concert. Nor does it compel men to continue to work against their will.

It is this confusion of labels, and the straining and refining of definitions, that obscure the real danger in this kind of legislation.

Thomas Jefferson clearly stated this danger when he said:

"Civil liberty is but the equipoise between contending forces. It is never destroyed at one fell swoop, but by gradual encroachment against which eternal vigilance is essential."

The early courts were *not* primarily interested in the legality of strikes, but were wholly interested in attempts to raise wages, strike or no strike.

It was the temerity of the employees seeking to raise the price for which they would sell their services that occupied the courts in labor relations cases.

Under the Common Law working men had no right to organize or to combine to enforce their demands for higher wages.

In England in the Eighteenth Century, when the laborers combined to enforce their demands, they were prosecuted for conspiracy.

In the **Journeyman Tailors' Case**, 8 Mod. 11 (1721), all combinations to raise wages were held to be conspiracies. This Common Law doctrine was inherited by our fathers from England.

In England the **Journeyman Tailors' Case** was followed by the enactment of statutes to penalize combinations to raise wages. *Even when acting singly*, workers were confronted, until 1813, with laws limiting the amount of wages which they might demand.

53 George III, Chapter 40.

Until 1824, he was punished as a criminal if he combined with his fellow workmen to raise wages or shorten hours, or to affect the business in any way, even if there was no resort to a strike.

In the United States also, there was presented the doctrine of the Common Law that all combinations to raise wages are illegal. These early cases are cited in

Documentary History of American Industrial Society, Volumes 3 and 4.

In **Peoples vs. Fisher**, 14 Wend. 9 (1835), this doctrine was upheld:

"That the raising of wages and a conspiracy, confederacy, or mutual agreement among journey-

men for that purpose is a matter of public concern and in which the people have a deep interest there can be no doubt. That it was an indictable offense at common law is established by legal adjudications * * *

I am of the opinion that the offense is indictable
* * *

People vs. Fisher, 14 Wend. (N. Y.) 9; 28 Am. Dec. 501.

On the other hand, collective action by employers was permitted in early law, but only under grant of a special charter from the King. Thus, the King granted charters to free citizens and to merchants and craft guilds. Armed with the charter the association could not be prosecuted as a conspiracy and was conceded the great privilege of acting as a unit and had continuous existence through the rights of succession.

The corporation charter freed the corporation from the taint of conspiracy, and at first could be secured only through special act of the Legislature. Finally, in the decade of the 50's, general corporation laws were enacted. It is now the privilege of all persons to combine their capital and form corporations, with but few restrictions. So complete is the right of association of capital that the law has introduced the fiction that corporations are persons entitled to all the rights of natural persons, and the rule of limited liability lessens the responsibility of the incorporators for the acts of the corporation.

Under the Common Law, as it existed up to that time, there were no restrictions upon the combinations of capital, but there were restrictions upon combinations of workers, both under the common law doctrine and by statute.

When these doctrines were accepted there was no 13th Amendment to the Federal Constitution, nor any Sec. 2, Art. 1 of the Wisconsin Constitution.

It was the raise in wages, the attempt by workingmen to put their own price on the only thing they had to sell or trade, their labor, that was the real concern of employers, backed by the full power of the King or the State.

And today, even though the doctrine of criminal conspiracy has been completely discredited, the same fundamental issue is involved in all labor disputes.

The attempt of workingmen to put their own price on the service they sell.

And it is only by acting in concert that the coercion and intimidation of employers can be met with any real effectiveness.

These words, coercion, intimidation and terror, are words that are freely bandied about and applied to workers acting in concert.

The intimidation, coercion and terror by employers is seldom mentioned and seldom considered in labor relations.

What form of intimidation can compare in potency with the threat of unemployment constantly hanging over the head of the wage worker?

Upon his daily wages depended his very living. His food, his clothing, his shelter. The health of his family, the education and care of his children.

Unemployment deprives him of wages (that is food, shelter, health, education). Even one day's unemployment is a serious business to him.

After he has worked ten or twelve or fifteen years in one line of industry and knows no other means of gaining a livelihood, that threat bulks large in his life. And as he grows older and no longer has the speed and agility of youth, it becomes a positive dread.

An employer who has the power to end the employment and cut off the workers' food and shelter, holds in his hands a weapon that for potency of coercion exceeds the threat of death itself.

Any man may in defiance of what he considers an invasion of his rights as a man, choose death rather than submit, but he must be indeed a superman who can long resist submission to any condition, when the alternative is for himself and for his children the semi-starvation of unemployment.

We stated before that the problem involved in this legislation is too fundamentally important to be solved by fine spun phrases or refined definitions.

To Prohibit Acting in Concert Is to Subject the Individual Workman to All the Power of the Employer's Weapon of Unemployment and Threat of Semi-Starvation.

To argue that under such circumstances there could be any real bargain, or that the workman could put his own price on his labor, is merely playing with words.

The experience of thousands of years should have taught us that industrial peace must be grounded in good faith and fairness of employer and employee, and cannot be forced by any compulsion of the State.

To compare attempts to put a price on one's own labor, with the ordinary business disagreements, that are the subject matter of most judicial actions, is to strain analogy to absurd limits.

The price of one's labor (and in "price" we include conditions under which it shall be given) is the most important matter in the life of a human being. It determines what food he shall eat, where he shall live, what he shall wear, what recreation or culture he may have. It determines the health and being of his children, their education, their culture. It determines what sphere he will occupy in the social structure. Whether he will exist in abject poverty on the minimum of subsistence or whether he and his family will really live in comfort and decency.

It is a prime factor in determining his life during the declining years of his old age. Whether he will be on the scrap heap, an object of private or public charity, or whether he can live in a dignified, independent, peaceful manner.

All of these things are part of the wage bargain, and are adversely affected by any restriction on the bargaining power.

No Combination of Words, in Any Language, Can Cover the Bald, Stark Fact That Prohibiting Workmen From Quitting Their Jobs in Concert, Compels Them to Work Against Their Will.

To say that each dissatisfied workman can quit his job as an individual is to ignore completely the threat of unemployment with its semi-starvation and its misery to the children and the home.

We are dealing with concrete conditions as they actually exist today, not with abstract and academic postulates of possible alternatives.

It cannot be argued that this judgment is narrowly limited to a few situations, and that such narrow limitation should be considered as favorable to the validity of the law.

If the basic theory is accepted, there can be no logical reason why it cannot be extended to any field which is tinged with a public interest.

And every lawful productive occupation supplying human needs or comforts is "tinged with a public interest."

Nazi Germany had no trouble extending it. Soviet Russia has no trouble extending it.

And in our own United States, when slavery, peonage and bonded servants were accepted labor relationships, the court in **People vs. Fisher**, 14 Wend. 9 (1835), had no trouble extending it, saying:

"That the raising of wages * * * is a matter of public concern."

Exactly the same arguments put forth to sustain this present Act, can be put forth to sustain its extension into all fields of human endeavor.

We do not wish to be misunderstood. We do not take the position that concerted action by workmen cannot be regulated or limited in any manner.

Far from it. But regulation and limitation are far different things than prohibition.

Regulation and limitation leave intact the economic power of concerted action. They merely prescribe methods by

Nos. 14 and 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

INTERNATIONAL UNION, UNITED AUTOMOBILE WORKERS OF AMERICA, A. F. OF L., LOCAL 232; ANTHONY DORIA, CLIFFORD MATCHEY, WALTER BERGER, ERWIN FLEISCHER, JOHN M. CORBETT, OLIVER DOSTALER, CLARENCE EHRLMANN, HERBERT JACOBSEN, LOUIS LASS,

Petitioners,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, HENRY RULE and J. E. FITZGIBBON, as Members of the Wisconsin Employment Relations Board; and BRIGGS & STRATTON CORPORATION, a Corporation,

Respondents.

ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

**BRIEF FOR THE
COMMONWEALTH OF PENNSYLVANIA,
AMICUS CURIAE**

GEORGE L. REED, *Solicitor,*
*Pennsylvania Labor Relations
Board.*

M. LOUISE RUTHERFORD,
Deputy Attorney General.

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Attorney General.

*Attorneys for the Common-
wealth of Pennsylvania.*

State Capitol,
Harrisburg, Pennsylvania.

SUBJECT INDEX.

	PAGE
I. Opinion of the Court below	2
II. Statement as to Jurisdiction	3
III. Question presented	4
IV. Statutes involved	5
V. Statement of the Case	6
VI. Interest of the Commonwealth of Pennsylvania	9
VII. Summary of Argument	14
VIII. Argument	18
(1) The Labor Management Relations Act, 1947, does not ipso facto preclude state legislation applicable to the same situations covered by the Federal statute	18
(2) The Bethlehem Steel Company decision has no application to the instant case	28
(3) Congress in enacting the Labor Management Relations Act, 1947, did not intend to strike down the Wisconsin Employment Relations Act	35
(4) The Labor Management Relations Act, 1947, does not touch a field in which the Federal interest is so dominant that the Federal system will be assumed to preclude enforcement of state laws on the same subject	37

- (5) The objects to be attained, and the character of the obligations imposed, by the Labor Management Relations Act, 1947, do not reveal a legislative intent to preclude enforcement of state laws on the same subject 40
- (6) Wisconsin policy has not produced a result inconsistent with or repugnant to the objectives of the Labor Management Relations Act, 1947, in the instant case 46

IX. Appendices:

- (1) Relevant provisions of the Labor Management Relations Act, 1947 48
- (2) Relevant provisions of the Wisconsin Employment Peace Act 53

TABLE OF CASES CITED

- Allen-Bradley Local No. 1111 etc. et al. v. Wisconsin Employment Relations Board et al., 315 U.S. 740 (1942) 21, 23, 25, 46
- Allen-Bradley Local No. 1111 etc. v. Wisconsin Employment Relations Board et al., 237 Wis. 164, 295 N.W. 791 (1941) 20
- American Federation of Labor et al. v. Reilly et al., 113 Colo. 90, 155 P. 2d 145 (1944) 21
- Bethlehem Steel Company et al. v. New York State Labor Relations Board, 330 U.S. 767 (1947) 12, 15, 26, 28, 29, 30
- Carpenters and Joiners Union of America, Local No. 213 et al. v. Ritter's Cafe et al., 315 U.S. 722 (1942) 26

Christoffel et al. v. Wisconsin Employment Relations Board et al., 243 Wis. 332, 10 N.W. 2d 197, (1943); 320 U.S. 776	25
Davega City Radio, Inc. v. State Labor Relations Board, 281 N.Y. 13, 22 N.E. 2d 145 (1939)	19
Food, Tobacco, Agricultural and Allied Workers Union of America, Local 186 etc. v. Smiley et al., 74 F. Supp. 823 (1946); 164 F. 2d 922 (1947)	13
Hill et al. v. State of Florida, 325 U.S. 538 (1945)	29
Hines et al. v. Davidowitz et al., 312 U.S. 52 (1941)	28, 38
Hotel & Restaurant Employees' International Alliance, Local No. 122 et al. v. Wisconsin Employment Relations Board et al., 315 U.S. 437 (1942)	25
Kelly v. State of Washington, 302 U.S. 1 (1937)	23, 44
National Labor Relations Board v. Fairblatt et al., 306 U.S. 601 (1939)	36
National Labor Relations Board v. Jones & Laughlin Steel Corporation, 301 U.S. 1 (1937)	36
Packard Motor Car Co. v. National Labor Relations Board, 330 U.S. 485 (1947)	28
Pittsburgh Railways Company Substation Operators and Maintenance Employees' Case, 357 Pa. 379, 54 A. 2d 891 (1947)	12, 23
Reid v. Colorado, 187 U.S. 137 (1902)	23
Rice et al. v. Santa Fe Elevator Corporation et al., 331 U.S. 218 (1947)	35, 38, 43
Santa Cruz Fruit Packing Co. v. National Labor Relations Board 303 U.S. 453 (1938)	41
South Carolina State Highway Department et al. v. Barnwell Bros. Inc. et al., 303 U.S. 177 (1938)	44
Southern Pac. Co. v. State of Arizona, 325 U.S. 761 (1945)	24

Thornhill v. Alabama, 310 U.S. 88 (1940)	26
Townsend et al. v. Yeomans et al., 301 U.S. 441 (1937)	43
Union Brokerage Co. v. Jensen et al., 322 U.S. 202 (1944)	39, 44
United Office and Professional Workers of America v. Smiley et al., 77 F. Supp. 659 (1948)	13
Wisconsin Employment Relations Board v. Algoma Plywood & Veneer Co., 252 Wis. 549, 32 N.W. 2d 417 (1948)	30
Wisconsin Labor Relations Board v. Fred Rueping Leather Co., 228 Wis. 473, 279 N.W. 675 (1938)	19
Wisconsin Employment Relations Board v. Milk & Ice Cream Drivers & Dairy Employees Union, Local No. 225, 238 Wis. 379, 299 N.W. 31 (1941); 316 U.S. 668 (1942)	25

STATUTES CITED

Labor Management Relations Act, 1947:	
Section 8, 29 U.S.C.A., Section 158 (pocket part)	48
Section 10(a) 29 U.S.C.A., Section 10 (pocket part)	40
Pennsylvania Labor Relations Act:	
Section 6 (j), 43 PS, Section 211.6 (pocket part)	10
Wisconsin Employment Peace Act:	
Section 111.01(4)	45
Section 111.06	46

MISCELLANEOUS AUTHORITIES

ALR, Volume 174, at pages 1071, 1072 (1948)

22

Black's Law Dictionary (Third Edition), at page 295

43

46 Michigan Law Review 593, at page 609—Article by Russel A. Smith on "The Taft-Hartley Act and State Jurisdiction over Labor Relations"

33

Case Caption .

Nos. 14 AND 15

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

International Union, United Automobile Workers of America, A. F. of L., Local 232; Anthony Doria, Clifford Matchey, Walter Berger, Erwin Fleischer, John M. Corbett, Oliver Dostaler, Clarence Ehrmann, Herbert Jacobsen, Louis Lass,

Petitioners,

vs.

Wisconsin Employment Relations Board, L. E. Gooding, Henry Rule and J. E. Fitzgibbon, as Members of the Wisconsin Employment Relations Board; and Briggs & Stratton Corporation, a Corporation,

Opinion of the Court

ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

**BRIEF FOR
THE COMMONWEALTH OF PENNSYLVANIA,
AMICUS CURIAE**

I. OPINION OF THE COURT BELOW

The opinion of the Supreme Court of the State of Wisconsin is reported in 250 Wis. 550, 27 N. W. 2d. 875 (R. 106-121).

II. STATEMENT AS TO JURISDICTION

The Commonwealth of Pennsylvania makes no claim, (and does not admit), that the instant case is one over which the Court has jurisdiction under the provisions of Section 237 of the Judicial Code, 28 U. S. C., section 344, 28 U. S. C. A. section 344. (Act of Congress of February 13, 1925, C. 229, section 1, 43 Stat. 937; Act of Congress of January 31, 1928, C. 14, section 1, 45 Stat. 54).

*Question Presented***III. QUESTION PRESENTED**

The only question discussed in this brief is:

Whether jurisdiction of the Wisconsin Employment Relations Board, the agency administering the Wisconsin Employment Peace Act (Wisconsin Laws of 1939, Chapter 57, as amended by Wisconsin Laws of 1943, Chapter 375, Wisconsin Laws of 1945, Chapter 424 and Wisconsin Laws of 1947, Chapter 2; Chapter 111, Sub-Chapter 1 of the Wisconsin Statutes, Sections 111.01 to 111.09) has been ousted by paramount federal authority in the instant case.

IV. STATUTES INVOLVED

The relevant provisions of the Labor Management Relations Act, 1947, (Act of June 23, 1947, Public Law 101, 80th Congress, 1st Session, 29 U. S. C. A. 151 et seq. (1947 Pocket Part)., defining unfair labor practices, are set forth in Appendix 1, *infra*, pp. 48-52. The relevant provisions of the Wisconsin Employment Peace Act, (Wisconsin Laws of 1939, Chapter 57, as amended by Wisconsin Laws of 1943, Chapter 375, Wisconsin Laws of 1945, Chapter 424 and Wisconsin Laws of 1947, Chapter 2; Chapter 111), defining unfair labor practices, are set forth in Appendix 2, *infra*, pp. 53-57.

Statement of the Case.

V. STATEMENT OF THE CASE

The facts of the case as stated by the Court below are as follows:

The Briggs & Stratton Corporation was engaged in manufacturing and operating two plants in Wisconsin. A contract between the petitioner, International Union, U. A. W. A., A. F. of L., Local 232, et al., and the company had expired. The union was the representative of the employees for the purpose of collective bargaining. Collective bargaining was in process to fix the terms of a new contract. During such bargaining both plants were in operation. While so in operation the employees of the company at the instance of the union and its officers had by concerted action while at work stopped work during their scheduled working hours and remained away until their next scheduled hour for commencement of work. The work was conducted by two shifts. The day shift quit work during their working hours and stayed away until the following morning and then resumed work. The night shift on these occasions when the day shift quit work failed to appear for work during their scheduled hour for work the night of that day and returned for and resumed work at their scheduled hour for commencing work on the next night. The total number of these instances was twenty-seven. In each instance the employees of the shift left in an orderly manner and went directly to attend a union meeting off the premises previously ordered by the union.

Statement of the Case

These meetings were called by certain of the defendants as officers or committees of the union at irregular times. No advance notice of the meetings was given to either the company or the employees because it was considered that without any notice the stoppages would most lessen production and effect injury on the company. The times were fixed without any other reason or purpose. The employees were told to go forthwith and went as told. The action of the employees was a concerted effort to, and did, interfere with production and was taken as economic pressure to compel the company to comply with the union's demands respecting the terms of the contract being negotiated. It was a concerted action taken for the purpose of interfering with production and it so operated. No secret ballot was taken by a majority of the employees of the collective bargaining unit involved to call a strike precedent to any one of the walkouts, or precedent to the succession of walkouts, although the employee members of the union present at a union meeting did vote, but not by secret ballot, to walk out as might be directed by a committee of the union. No demand was made upon the company that any or a succession of walkouts would be engaged in unless the company acceded to the terms of the new contract as proposed by the union.

The Wisconsin Employment Relations Board specifically further found:

"That all of such work stoppages were engaged in for the purpose of interfering with the production of the complainant and by such interference to induce and compel the complainant to accede to the demands of the union to be

Statement of the Case

included in the collective bargaining agreement being negotiated between the parties.

“That the respondent union and the individual respondents have publicly stated that it is their intent and purpose to continue to engage in work stoppages similar to the stoppages engaged in on November 6, 1945, and twenty-six times since then, up to and including the 22d day of March, 1946, for the purpose of inducing and coercing the complainant into compliance with their demands; and have threatened employees that failure to engage in such work stoppages and to attend the union meetings following such stoppage when directed by the respondent union and its officers, will result in punishment to employees of the complainant.

“That several employees of the complainant who failed and refused to take part in such work stoppages had their locker boxes damaged, clothing cut, ripped and otherwise damaged, tools and other property concealed or injured, and were subjected to assaults and threats of violence. That such acts were committed in the main on the property of the complainant company by persons unidentified. ●

“That the employees within the collective bargaining unit represented by the respondent union and employed by the complainant, never conducted a vote of any kind at which the union was directed to call a strike and that no strike has been called by the respondent union nor by the employees of the Briggs & Stratton Corporation against the company at any time.”

*Interest of the Commonwealth of
Pennsylvania*

VI. INTEREST OF THE COMMONWEALTH OF
PENNSYLVANIA.

The Commonwealth of Pennsylvania has a statute, commonly known as the "Pennsylvania Labor Relations Act", being the Act of June 1, 1937, P. L. 1168, to be found in 43 PS, sections 211.1 to 211.13 inclusive, which as enacted was virtually a transcript of the National Labor Relations Act of July 5, 1935. By reason of amendments to the Pennsylvania Labor Relations Act, the statutes became somewhat divergent with respect to procedural provisions, but the two acts remained identical as to objects and purposes. The Pennsylvania statute, at no point, is either contrary or repugnant to the policies of Congress as set forth in the National Labor Relations Act of 1935, or its successor, the Labor Management Relations Act, 1947. It does not deprive any employee, subject to the jurisdiction of state authority, of rights protected or guaranteed by federal legislation.

The Pennsylvania statute provides for administration under two broad classifications. The first class has to do with the ascertainment of an appropriate bargaining unit and the certification of the collective bargaining representatives who shall have been designated or selected by the majority of the employees in that unit. The second class is for the prevention of unfair labor practices. Thereunder

*Interest of the Commonwealth of
Pennsylvania*

the agency hears complaints, states findings of fact, and may make "cease and desist" orders or other orders appropriate to the effectuation of the policies of the Act.

Section 6 of the Pennsylvania Labor Relations Act which defines unfair labor practices, as originally enacted on June 2, 1937, was a transcript of Section 8 of the National Labor Relations Act. The only unfair labor practices defined therein were employer unfair labor practices. However, by the amendatory Acts of June 9, 1939, P. L. 293; June 30, 1947, P. L. 1160; and July 7, 1947, P. L. 1445, all to be found in 43 PS section 211.6 (pocket part), the Act presently defines employee or labor union unfair labor practices as follows:

(2) It shall be an unfair labor practice for a labor organization, or any officer of a labor organization, or any agent or agents of a labor organization, or any one acting in the interest of a labor organization, or for an employe or for employes acting in concert—

(a) To intimidate, restrain, or coerce any employe for the purpose and with the intent of compelling such employe to join or to refrain from joining any labor organization, or for the purpose or with the intent of influencing or affecting his selection of representatives for the purposes of collective bargaining.

(b) During a labor dispute, to join or become a part of a sit-down strike, or, without the employer's

*Interest of the Commonwealth of
Pennsylvania*

authorization, to seize or hold or to damage or destroy the plant, equipment, machinery, or other property of the employer, with the intent of compelling the employer to accede to demands, conditions, and terms of employment including the demand for collective bargaining.

(c) To intimidate, restrain, or coerce any employer by threats of force or violence or harm to the person of said employer or the members of his family, with the intent of compelling the employer to accede to demands, conditions, and terms of employment including the demand for collective bargaining.

(d) (Act of June 30, 1947) To picket or cause to be picketed a place of employment by a person or persons who is not or are not an employe or employes of the place of employment.

(d) (Act of July 7, 1947) To engage in a secondary boycott, or to hinder or prevent by threats, intimidation, force, coercion or sabotage the obtaining, use or disposition of materials, equipment or services, or to combine or conspire to hinder or prevent by any means whatsoever, the obtaining, use or disposition of materials, equipment or services.

(e) To call, institute, maintain or conduct a strike or boycott against any employer or industry or to picket any place of business of the employer or the industry on account of any jurisdictional controversy."

*Interest of the Commonwealth of
Pennsylvania*

After the decision of Your Honorable Court in *Bethlehem Steel Company, et al. v. New York State Labor Relations Board*, 330 U. S. 767, which was decided April 7, 1947, the Supreme Court of Pennsylvania, on September 29, 1947, handed down a decision in *Pittsburgh Railways Company Substation Operators and Maintenance Employees' Case*, 357 Pa. 379, 54 A. 2d 891, wherein it was held that *the criterion to determine the validity of the exercise of state power is not whether the agency administering federal law has acted upon the relationship in a given case, but rather whether Congress has asserted its power to regulate that relationship.* It was held that the Pennsylvania Labor Relations Board could not constitutionally entertain the petition for the bargaining agent of the employees in that case, upon a record showing that the National Labor Relations Board had never assumed jurisdiction over the employer or any of its employees, on the theory that Congress had asserted its power of regulation, and jurisdiction in the National Labor Relations Board was exclusive.

As a result of this decision of Pennsylvania's highest appellate court, many cases upon appeal from final orders of the Pennsylvania Labor Relations Board are now pending in the courts of Pennsylvania and, in two instances, the Board has been restrained by courts of the United States from making investigations commanded by the Pennsylvania statute in cases involving employees of Pennsylvania employers. See

*Interest of the Commonwealth of
Pennsylvania*

*Food, Tobacco, Agricultural and Allied Workers
Union of America, Local 186, etc. v. Smiley et al.,*
74 F. Supp. 823 (1946); 164 F. 2d 922 (1947);

*United Office and Professional Workers of America
v. Smiley et al.,* 77 F. Supp. 659 (1948).

Wherefore, Pennsylvania, like Wisconsin, has a vital interest in the question: How far and to what extent is the Pennsylvania agency barred from administering the state statute by reason of the enactment of the Labor Management Relations Act, 1947?

Summary of Argument

VII. SUMMARY OF ARGUMENT

(1) The Labor Management Relations Act, 1947 does not ipso facto preclude state legislation applicable to the same situations covered by federal statute. There is nothing in the record showing that the employer, Briggs & Stratton Corporation ever was a party to any proceeding before the National Labor Relations Board or, in fact, was before the National Board in any proceeding or manner other than in March, 1938, the National Board assumed jurisdiction over a petition for certification of the company's employees and certified the Petitioner as having been designated the collective bargaining agent, which certification has never been set aside, reversed or modified. The instant case comes squarely within the rule that unless or until the National Board has elected to exercise its jurisdiction over the particular controversy involving the same issues before the State Board, the State Board is free to exercise its jurisdiction under the analogous or consistent provisions of the State Act.

It is the established rule that the jurisdiction of a federal agency and a state agency is concurrent whenever the state legislation does not contravene the provisions of the federal legislation, (absent a clear and manifest purpose of Congress to the contrary), except where the jurisdiction of the federal agency, has, in fact, been invoked or

Summary of Argument

exercised in the particular matter in controversy before the state agency.

(2) *Bethlehem Steel Company et al. v. New York State Labor Relations Board*, 330 U. S. 767 (1947) has no application to the instant case as there is nothing in that case to indicate an intended ruling that a state agency is without power to administer the state act with respect to charges of unfair labor practices against employers, employees or unions, provided that the state policy is not contrary or repugnant to federal policy.

The Bethlehem Steel Company case is an application of the doctrine that state regulation cannot be permitted to frustrate national policy especially where, as in that case, federal policy was definitely adverse to foremen unionization and not merely neutral in the matter.

(3) Congress in enacting the Labor Management Relations Act, 1947 did not intend to strike down the Pennsylvania Labor Relations Act under the rule that the historic police powers of states are not to be superseded by a federal act unless that was the clear and manifest purpose of Congress. This is especially true of the Labor Management Relations Act, 1947 because the scope of federal power may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.

Summary of Argument

(4) The Labor Management Relations Act, 1947 does not touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. An implied intent to exclude state administration of the state labor relations act should not be found because there has been little or no conflict since 1937 when the Wisconsin and Pennsylvania Acts came into force and effect. Also, as the purpose of the federal legislation is not primarily to regulate commerce but to secure and preserve industrial peace, the federal interest is not so dominant that the state should be precluded from applying its own policy, when not inconsistent with federal policy, to secure and preserve industrial amity.

Federal legislation like the Alien Registration Law of 1940 and the United States Warehouse Act are to be distinguished. This case calls for the application of the rule "that where the government has provided for collaboration, the courts should not find conflict."

(5) The object sought to be obtained, and the character of the obligations imposed, by the Labor Management Relations Act, 1947 does not reveal a legislative intent to preclude enforcement of state laws on the same subject. Section 10(a), which provides for the ceding of jurisdiction in certain cases, does not evince the clear and manifest purpose of Congress to bar concurrent jurisdiction, which is the test of legislative intent.

Congress intended to permit its agency to cede jurisdiction over cases of labor disputes where state adminis-

Summary of Argument

tration was otherwise barred because federal authority had been asserted in the particular case or labor dispute.

As implied congressional intent is dependent upon the character of the federal statute and upon the public interest, to be served by maintaining state administration under the state statute, it should not be held that the Labor Management Relations Act, 1947 impliedly evinces an intent to strike down the Wisconsin statute or preclude its administration by the Wisconsin Employment Relations Board.

(6) Wisconsin policy has not produced a result inconsistent with, or repugnant to, the objectives of the Labor Management Relations Act, 1947 in the instant case.

When comparison of the unfair labor practices defined in the Wisconsin statute is made with the unfair labor practices defined in the federal act, it is certain that no Wisconsin employer or employee is deprived of rights protected or granted by the Constitution of the United States or by the federal statute. Since the state system of regulation as construed and applied in the instant case can be reconciled with the federal act and since the two as focused in this case can consistently stand together, the order of the State Board should be sustained and the judgment of the court below affirmed.

Argument

VIII. ARGUMENT

(1)

The Labor Management Relations Act, 1947, does not ipso facto preclude state legislation applicable to the same situations covered by the federal statute.

In Petitioner's Brief, at page 11, it is said that "By the passage of the Labor Management Relations Act of 1947, Congress has expressly pre-empted the field of unlawful conduct on the part of labor unions and employees and has established a comprehensive code for regulation and treatment of such conduct," and "has expressly excluded the state from assuming concurrent jurisdiction over unfair labor practices committed by unions or employees" unless permission is given by the National Labor Relations Board to the state agency. The reasons urged by Petitioner to bar the states from exercising jurisdiction over labor disputes, if and when it is found that the employer is engaged in interstate commerce, or where the employer's operations affect interstate commerce, are substantially the same reasons which were urged to bar state jurisdiction during the period that the National Labor Relations Act was in force and operation. The rule universally accepted by courts has been that the National Labor Relations Act did not ipso facto preclude state legislation applicable to the same situations covered by the federal statute. This rule was

Argument

expressed in various ways. In *Davega City Radio, Inc. v. State Labor Relations Board*, 281 N. Y. 13, 22 N. E. 2nd 145, 147, 148, 149 (1939), a decision of the Court of Appeals of New York considering the New York State Labor Relations Act as originally enacted when it was virtually a transcript of the National Labor Relations Act, it was said by Finch, J., that (*italics ours*):

"From a study of authorities it does not appear that the National Labor Relations Act ipso facto precludes the State legislation applicable to the same situations. . . . That the National Labor Relations Board is given exclusive jurisdiction under the National Act is of significance only in fixing the appropriate agency to enforce the National act, and is not relevant to the question whether a consistent State law may co-exist with a National Act. .

"We reach the conclusion, therefore, that the State Labor Relations Board may enforce the State act at least until such time as it is ousted by the exercise by the National Labor Relations Board of its jurisdiction under the National act. . . ."

In *Wisconsin Labor Relations Board v. Fred Rueping Leather Co.*, 228 Wis. 473, 279 N. W. 673, 677 (1938), wherein the Supreme Court of Wisconsin considered the Wisconsin Labor Relations Act of 1937, which was repealed in 1939 when the Wisconsin Employment Peace Act was enacted, it was said by Wickham, J., that (*italics ours*):

"It is not seriously contended that the Wisconsin act, which is conceded to be nearly identical both in

Argument

purpose and method with the national act, discriminates against or unduly burdens interstate commerce. *The conclusion is inevitable that it constituted a valid exercise of the police power of this state even as to those labor relationships which fall within the commerce clause * * **

In *Allen-Bradley Local No. 1111, etc. v. Wisconsin Employment Relations Board, et al.*, 237 Wis. 164, 295 N. W. 791 (1941), the contention was made that "The Wisconsin Act and the National Act both regulate the same subject; that the Wisconsin Act is so inconsistent with and in conflict with the National Act, in the public policy each Act seeks to enforce and in their major terms and provisions, that the two acts cannot consistently stand together, in so far as applicable to interstate commerce."

Chief Justice Rosenberry, in answering these contentions, said at page 800, that (italics ours):

"Appellants specified nine ways in which the state and federal acts conflict but as already pointed out, *these conflicts do not exist until the National Labor Relations Act is applied by the National Labor Relations Board in a particular case. As has already been pointed out state power is not destroyed by federal action, it is merely suspended in a particular case. If a man who owns and possesses a tool and is forbidden to use it, he still has the tool. He is deprived not of the tool but of the power to make use of it. The state is not deprived of its power to deal with labor relations by the National Labor Relations Act. Its power is*

Argument

suspended so far as is necessary to give effect to that act."

In *American Federation of Labor, et al. v. Reilly, et al.*, 113 Colo. 90, 155 P.2d 145, 150, 151 (1944), a decision of the Supreme Court of Colorado, in a proceeding to test the constitutionality of the Colorado Labor Peace Act, which is patterned very closely on the Wisconsin Employment Peace Act, it was said by Knouse, J., with respect to *Allen-Bradley Local No. 1111 etc., et al. v. Wisconsin Employment Relations Board, et al.*, 315 U. S. 740 (1942), hereinafter considered in this brief (italics ours):

" * * * the control which Congress, under the commerce clause, had asserted over the subject matter of labor disputes in passing the National Labor Relations Act, was not so pervasive or exclusive as to prevent Wisconsin, in the exercise of its police power, from enacting legislation regulating the type of employee or union activity involved in the challenged order, which was upheld. * * * Congress had designedly left open an area for state control, and that conflicts between federal and state enactments, or orders arising therefrom, within that area should be resolved only upon 'concrete and specific issues raised by actual cases'."

There is nothing in the record showing that the employer, Briggs & Stratton Corporation, ever was a party to any proceeding before the National Labor Relations Board. This employer was never before the National Board in any proceeding or in any manner other than in March,

Argument

1938, the National Board assumed jurisdiction over a labor dispute between its employees as to representation for collective bargaining, and in that proceeding Petitioner was certified as having been designated the collective bargaining agent for all hourly paid employees of the employer, which certification has not been set aside, reversed or modified (R. 91). There is no other union which has bargaining relations with the employer (R. 33). Employer has from time to time had written contracts with Petitioner, and before and since the last contract expired in 1944, there have been negotiations for a new contract between the parties (R. 34).

Obviously, this case comes squarely within the rule succinctly stated in 174 ALR 1071, 1072 (1948) that (italics ours):

"Unless or until the National Board has elected to exercise its jurisdiction under the national act over the particular controversy involving the same issues as those before the state board, the state board is free to exercise its jurisdiction under the analogous or consistent provisions of the state act. . . ."

"And, conversely, it was held that the jurisdiction of the State Labor Relations Board may be ousted if the Federal Labor Relations Board has elected to exercise its jurisdiction over the particular matter in dispute under its authority under the national act. . . ."

All judicial authority supports the view that the jurisdiction of a federal agency and a state agency is concurrent whenever the state legislation does not contravene the provisions of the federal legislation—absent a clear and mani-

Argument

fest purpose of Congress, to the contrary—*except where the jurisdiction of the federal agency has in fact been invoked or exercised in the particular matter in controversy before the state agency*, and not the view expressed by the Supreme Court of Pennsylvania in *Pittsburgh Railways Company Substation Operators and Maintenance Employees case*, 357 Pa. 379, 54 A. 2d 891 (1947), of exclusive jurisdiction of the Federal agency unless or until federal jurisdiction is relinquished in favor of state jurisdiction. It was said by Chief Justice Hughes in *Kelly v. State of Washington*, 302 U. S. 1, 11 (1937), quoting from *Reid v. Colorado*, 187 U. S. 137, 149, 150 (1902), that (*italics ours*)

“ * * * It should never be held that Congress intends to supersede, or by its legislation suspend, the exercise of the police powers of the states, even when it may do so, unless its purpose to effect that result is clearly manifested. This court has said—and the principle has been often reaffirmed that ‘in the application of this principle the supremacy of an act of Congress in a case where the state law is but the exercise of a reserved power, the repugnance or conflict be direct and positive, so that the two acts could not be reconciled or consistently stand together’.”

Clearly in point is *Allen-Bradley Local No. 1111, et al. v. Wisconsin Employment Relations Board, et al.*, *supra*, wherein at page 741, it was said by Mr. Justice Douglas that (*italics ours*):

“The sole question presented by this case is whether an order of the Wisconsin Employment Rela-

Argument

*tions Board entered under the Wisconsin Employment Peace Act * * * is unconstitutional and void as being repugnant to the provisions of the National Labor Relations Act, * * **

In this opinion, it was further stated by the Court at pages 745, 749 that (italics ours):

"It was admitted that the company was subject to the National Labor Relations Act. The federal Board, however, had not undertaken in this case to exercise the jurisdiction which that Act conferred on it. Accordingly, the Supreme Court of Wisconsin upheld the order of the state Board stating that 'there can be no conflict between the acts until they are applied to the same labor dispute.' * * *

.

"* * * this Court has long insisted that 'an intention of Congress to exclude states from exerting their police power must be clearly manifested'. * * *

Particularly in point is *Southern Pac. Co. v. State of Arizona*, 325 U. S. 761, 766 (1945), wherein Chief Justice Stone said (italics ours):

"Congress, in enacting legislation within its constitutional authority over interstate commerce, will not be deemed to have intended to strike down a state statute designed to protect the health and safety of the public unless its purpose to do so is clearly manifested, * * * or unless the state law in terms or in its practical administration, conflicts with the Act of

Argument

Congress, or plainly and palpably infringes its policy. . . .

It has been held by Your Honorable Court that cease and desist orders of the Wisconsin Employment Relations Board, entered against unions and employees for the violation of the several unfair labor practices enumerated in Section 6 of the Wisconsin Employment Peace Act, were not unconstitutional and void as being repugnant to the provisions of the National Labor Relations Act of 1935:

Hotel & Restaurant Employees' International Alliance, Local No. 122 et al., v. Wisconsin Employment Relations Board et al., 315 U.S. 437 (1942);

Allen-Bradley Local No. 1111 etc., et al. v. Wisconsin Employment Relations Board et al., *supra*;

Wisconsin Employment Relations Board v. Milk & Ice Cream Drivers & Dairy Employees Union, Local No. 225, 238 Wis. 379, 299 N.W. 31 (1941), certiorari denied 316 U.S. 668 (1942);

Christoffel et al. v. Wisconsin Employment Relations Board et al., 243 Wis. 332, 10 N.W. 2d 197 (1943), certiorari denied 320 U.S. 776 (1943).

In the last mentioned case, wherein it was a matter of record that the union was the bargaining representative of the employees by virtue of a certification previously made by the National Labor Relations Board, it was said by Fowler, J., that (italics ours):

... there was no conflict of jurisdiction because proceedings between the interested adverse

Argument

parties had been before the national board involving matters not in issue before the state board."

It is because

"the rights of employers and employees to conduct their economic affairs, and to compete with others for a share in the products of industry are subject to modification or qualification in the interests of the society in which they exist",

and because the unfair labor practices to be found in Section 6 of the Wisconsin Employment Peace Act are but instances "of the power of the State to set the limits of permissible contest open to industrial combatants."

Thornhill v. Alabama, 310, U.S. 88, 103, 104 (1940);

Carpenters and Joiners Union of America, Local No. 213 et al. v. Ritter's Cafe et al., 315 U.S. 722, 728 (1942),

that the judgment of the Court below should be affirmed.

The following questions remain for consideration and will hereafter be answered in this brief under appropriate headings:

1. Did *Bethlehem Steel Company et al. v. New York State Labor Relations Board*, 330 U.S. 767 (1947), announce a new canon of construction which bars state jurisdiction in the instant case?

2. Did Congress, in enacting the Labor Management Relations Act, 1947, intend to strike down the Wisconsin Employment Peace Act by providing for a scheme for

Argument

federal regulation so pervasive as to make reasonable the inference that Congress left no room for Wisconsin to supplement it?

3. Does the Labor Management Relations Act, 1947, touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject?

4. Do the objects sought to be attained, or the character of the obligations imposed by the Labor Management Relations Act, 1947, reveal a legislative intent to preclude enforcement of state laws on the same subject?

5. Has Wisconsin's policy in the instant case produced a result inconsistent with or repugnant to the objectives of the Labor Management Relations Act, 1947?

Argument

(2)

The Bethlehem Steel Company decision has no application to the instant case.

In *Bethlehem Steel Company, et al. v. New York State Labor Relations Board, supra*, the appeals challenged the validity of the New York State Labor Relations Act as applied to a manufacturing corporation to permit unionization of foremen. However, there is nothing in the opinion of Mr. Justice Jackson in that case to indicate an intended ruling that a state agency is without power to administer the state act with respect to charges of unfair labor practices against employers, employees or unions, provided that the state policy is not contrary or repugnant to Federal policy. It was because of the decision in *Packard Motor Car Co. v. National Labor Relations Board*, 330 U.S. 485 (1947), holding that foremen have an absolute right to organize in foremen unions under the National Labor Relations Act, that the power of the New York agency to exercise jurisdiction over units limited to foremen did not exist. The sole objection to state jurisdiction in the Bethlehem Steel Company case was the oft repeated rule of Federal construction that, in a given case, state jurisdiction is ousted when the state statute, or state administration thereunder, "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress:"

Hines et al. v. Davidowitz et al., 312 U.S. 52, 66, 67 (1941):

Argument

Hill et al. v. State of Florida, 325 U.S. 538, 542 (1945).

It was said by Mr. Justice Jackson in

Bethlehem Steel Co. et al. v. New York State Labor Relations Board, *supra*, at page 776 (italics ours):

" * * * The federal board * * * asserts, and rightfully so, under our decision in the Packard case, *supra*, its power to decide whether these foremen may constitute themselves a bargaining unit. We do not believe this leaves room for the operation of the state authority asserted."

The contention of the Commonwealth of Pennsylvania has the support of the three well considered decisions of the Supreme Court of Wisconsin now before this Court for review. The Court below appropriately said (italics ours):

" * * * The point at issue in the *Bethlehem Steel Co. case, supra*, was * * * whether the State Labor Relations Board could under a state act on petition of foremen in an industrial plant authorize formation of a unit for furthering their mutual interests and for collective bargaining which the National Labor Relations Board under a Federal act had declined to authorize. * * * "

" * * * What the court held was that the National Labor Relations Board had exercised the jurisdiction delegated to it under the Federal Act by declining to designate the foremen as a bargaining unit. The dec-

Argument

lination was an exercise of its jurisdiction, just as much as granting it would have been. The jurisdiction vested in the National Labor Relations Board was to determine whether it would designate the Foremen as a bargaining unit, and it exercised jurisdiction when it denied the application.

No such situation exists in the instant case as was involved in the Bethlehem Steel Co. case, supra. . . . no application has been made to the National Labor Relations Board to exercise any jurisdiction of the labor dispute here involved. The National Labor Relations Board not having exercised any jurisdiction of such labor dispute the State Board may exercise jurisdiction of it. No conflict is here involved. . . ." (R. 118, 119).

In *Wisconsin Employment Relations Board v. Algoma Plywood & Veneer Co.*, 252 Wis. 549, 32 N.W. 2d 417, 420, 421 (1948), there is a comprehensive discussion of *Bethlehem Steel Co. v. New York State Labor Relations Board*, *supra*. It was said by Wickham, J., that (italics ours):

"We now come to the case of *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767, 67 S. Ct. 1026, 1028, 91 L. Ed. 1234. That case dealt with a situation in which the New York State Labor Board had permitted foremen to organize to constitute a collective bargaining unit. The question whether foremen should consistently with the policy of the national act be organized as a bargaining unit had had various solutions by the National Board. In the beginning it

Argument

had recognized the rights of the foremen and 'later, there was a period when, for policy reasons but without renouncing jurisdiction, it refused to approve foreman organization units.' The application of the foremen to the state board was the result of this policy on the part of the national board. *Later during the pendency of the case in the courts of the state of New York the Supreme Court in Packard Motor Car Company v. National Labor Relations Board*, 330 U.S. 485, 67 S. Ct. 789, 91 L. Ed. 1040, had held that the national act entitled foremen to the rights of self-organization under the act. The court in the Bethlehem case (330 U.S. 767, 67 S. Ct. 1030) follows the decision in the Allen-Bradley case to the effect that in the national act congress has 'sought to reach some aspects of the employer-employee relations out of which such inferences arise. * * * Where it leaves the employer-employee relation free of regulation in some aspects, it implies that in such matters federal policy is indifferent, and since it is indifferent to what the individual of his own volition may do we can only assume it to be equally indifferent to what he may do under compulsion of the state,' citing the Allen-Bradley case. It was held, however, following the case of *Hill v. State of Florida*, 325 U.S. 538, 65 S. Ct. 1373, 89 L. Ed. 1782, that 'the power of the state may not so deal with matters left to its control as to stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"'. The court concluded that where Congress had implemented the act by the delegation of rulemaking power to an administrative body

and where that body in the exercise of its delegated power has adopted a rule of policy the state power is abrogated, at least so far as the subject matter of the rule is concerned. While the state regulation in some fields may be invalid even though a particular phase of the subject has not been covered by rule it was held that where the measure in question relates to what might be considered a separate or distinct segment of the matter, the states are generally permitted to exercise their police power as to the matters omitted by the administrative rules. It is said, however, that 'the conclusion must be otherwise where failure of the federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute.' The court points out that the failure of the National Labor Relations Act to entertain the foremen's petitions was of the latter class; that the board had never denied its jurisdiction over the petitions and had made it clear that its refusal to designate foremen's bargaining units 'was a determination and an exercise of its discretion to determine that such units were not appropriate for bargaining purposes.' The court then says:

'The State argues for a rule that would enable it to act until the federal board had acted in the same case. But we do not think that a case by case test of federal supremacy is permissible here. The federal board has jurisdiction of the industry in which these particular employers are engaged and has asserted control of

Argument

their labor relations in general. * * * We do not believe this leaves room for the operation of the state authority asserted. * * *

The Bethlehem case has limited the case-by-case doctrine commonly attributed to the Wisconsin decisions only to the extent of holding that where there has been a valid general exercise of its administrative power by the National Labor Relations Board neither repugnant provisions of the state law nor repugnant policies of the state board are effective to defeat the purpose and policy of the exercise. See 'The Taft-Hartley Act and State Jurisdiction Over Labor Relations', Russel A. Smith, 46 Michigan Law Review 593 at page 609, where in commenting upon the Bethlehem case it is said:

'On its facts the case is easily understood simply as an application of the doctrine that state regulation cannot be permitted to frustrate national policy — in this situation a policy definitely adverse to foremen unionization, not merely neutral in the matter'."

For reasons so clearly stated in the decision last cited, it is certain that "a case by case test of federal supremacy," which is not permissible in a certification case where federal authority had been asserted over a group or class of employes which constituted an "aspect" of the general employer-employee relationship or "a separable or distinct segment" of the employer-employee relationship, is permissible in charge cases. The very nature of the terms "aspect" and "separable or distinct segment" precludes

Argument

their application to unfair labor practices which either the Congress or the legislatures of the several states may create.

For these reasons, the Bethlehem Steel Company decision is not controlling in the instant case.

Argument

(3)

Congress in enacting the Labor Management Relations Act, 1947, did not intend to strike down the Wisconsin Employment Peace Act.

In *Rice et al. v. Santa Fe Elevator Corporation et al.*, 331 U.S. 218, 230 (1947), after stating the dominant Federal canon for the construction of Federal statutes, to wit: "*the historic police powers of States (are) not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress*," Mr. Justice Douglas says that the purpose of Congress may be evidenced in several ways. Four ways are specified as follows:

1. "The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."

2. "The Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."

3. "The object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose."

4. "The State policy may produce a result inconsistent with the objective of the federal statute."

It cannot be said that the scheme for federal regulation provided in the Labor Management Relations Act, 1947, is

Argument

so pervasive as to make reasonable an inference that Congress left no room for Wisconsin to supplement it. It is as true of the Labor Management Relations Act, 1947, as it was of the National Labor Relations Act of 1935, that Congress intended "to exercise whatever power is constitutionally given to it to regulate commerce by the adoption of measures for the prevention or control of certain specified acts—unfair labor practices—which provoke or tend to provoke strikes or labor disturbances affecting interstate commerce." *National Labor Relations Board v. Fainblatt et al.*, 306 U.S. 601, 607 (1939). Where Congress intends to prevent strikes or labor disturbances through a regulation of commerce, it can not be presumed that Congress intended to prevent Wisconsin from preventing strikes or labor disturbances within its borders by the same processes which Congress has approved.

Certainly the Wisconsin statute may exist and be administered by the state agency because as was said by Chief Justice Hughes in *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U.S. 1, 37 (1937) (italics ours):

" * * * Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. * * * The question is necessarily one of degree. * * * "

(4)

The Labor Management Relations Act, 1947, does not touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.

The Wisconsin Labor Relations Act of 1937 and its successor, the Wisconsin Employment Peace Act, like the Pennsylvania Labor Relations Act, have been in force and effect since 1937. There has been little or no conflict between the Federal agency and the state agencies with respect to administration. Doubtless this absence of conflict has resulted from the fact that there is a relatively small twilight zone wherein conflict could normally have arisen. The National Labor Relations Board has unquestioned jurisdiction over the large employers of industry whose activities are nation-wide in scope. In the main, the state agencies have assumed jurisdiction over labor disputes where the employer is engaged in a business which is essentially local, or, at least, where the labor dispute among the employees of a large employer is limited to employees who work within the confines of the state, and only then, when Federal jurisdiction has not been invoked with respect to the state employees.

As the purpose of the Federal legislation is not primarily to regulate commerce, but to secure and preserve

Argument

industrial peace, it can not be said that the Federal interest is so dominant that the state be precluded from applying its own policy, when not inconsistent with Federal policy, to secure and preserve industrial amity and good will.

The Labor Management Relations Act, 1947, is not analogous to the Alien Registration Law of 1940, by which a standard for alien registration in a single integrated and all-embracing system was provided. In that instance, the Federal interest was so dominant as to preclude enforcement of the Pennsylvania Alien Registration Act: *Hines et al. v. Davidowitz et al.*, *supra*. Neither is the Labor Management Relations Act, 1947, analogous to the United States Warehouse Act regulating warehouses engaged in the storage of grain for interstate or foreign commerce. Such warehouses were clearly in the Federal domain, and in that Act, Congress exerted such a pervasive regulatory authority as to prove a legislative intent to make the legislation all embracing and exclusive, as was held in *Rice et al. v. Santa Fe Elevator Corp.*, *et al.*, *supra*. These and like cases are to be distinguished from the instant case because it is apparent that if Wisconsin, Pennsylvania, and other states having labor relations acts patterned upon the Federal statute, are to be prohibited from administering the state statutes, there will be a substantially large number of labor disputes, some of which may impair or interrupt the free flow of commerce, which can not be the subject of administrative relief, either Federal or state.

Inasmuch as there has been complete cooperation between the Federal agency and the state agencies in achieving the remedial purposes of the Federal legislation,

Argument

this is a situation which calls for the application of the rule stated by Mr. Justice Frankfurter in *Union Brokerage Co. v. Jensen et al*, 322 U.S. 202, 209 (1944) that (italics ours):

.. * * * *Where the Government has provided for collabogation the courts should not find conflict.* * * *

(5)

The objects sought to be obtained, and the character of the obligations imposed, by the Labor Management Relations Act, 1947, do not reveal a legislative intent to preclude enforcement of State laws on the same subject.

Petitioner asserts that by Section 10 (a) of the Labor Management Relations Act, 1947, Congress has expressly excluded the state from assuming concurrent jurisdiction over unfair labor practices (R. 11).

Section 10 (a) of the National Labor Relations Act of 1935 empowered the National Board to prevent any person from engaging in any unfair labor practice affecting commerce, and added "*This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law or otherwise.*"

The full text of Section 10 (a) of the Labor Management Relations Act, 1947, is as follows (italics ours):

"The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided, That the Board is empowered by agreement*

Argument

with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territory statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith."

When consideration is given to the fact that Congress has deleted the words "This power shall be exclusive" and has substituted a power to "cede" jurisdiction, it cannot be said that Congress has "expressly" excluded the state from assuming concurrent jurisdiction, as contended by Petitioner (R. 11). In fact, Section 10 (a) does not evince "the clear and manifest purpose of Congress" to bar concurrent jurisdiction, which is the test of legislative intent according to repeated decisions of Your Honorable Court.

The National Labor Relations Act of 1935 did not classify industry. The question to be faced under that Act upon particular facts in each case was whether the unfair labor practices involved had such a close and substantial relation to the freedom of interstate commerce from injurious restraint that these practices could constitutionally be made the subjects of federal cognizance through provisions looking to the peaceable adjustment of labor disputes: *Santa Cruz Fruit Packing Co. v. National Labor Relations Board*, 303 U.S. 453, 467 (1938).

Argument

When passing the Labor Management Relations Act, 1947, Congress must have known, what every labor board knows, that there are many employers whose operations affect interstate commerce, who have never been a party to any proceeding before the National Labor Relations Board. There are many employers whose employees have never been organized. It is inconceivable that Congress intended to give exclusive jurisdiction over labor disputes among the employees of such employers so that the state agency could only have such jurisdiction as was "ceded," as urged by Petitioner (R. 11).

It should be noted that Congress has divided industries into two distinct classifications. The first class contains all industries excluding the mining, manufacturing, communications and transportation industries, and including the mining, manufacturing, communications and transportation industries whenever it appears that their operations are predominantly local in character. The second class contains the four named industries, viz.: mining, manufacturing, communications and transportation, if and when their operations are not predominantly local in character. Congress has not evinced a clear and manifest purpose to confer exclusive jurisdiction in all cases involving employers in the class first enumerated, merely to permit the National Labor Relations Board to cede it back to the states. To the contrary, it would seem to be the clear and manifest purpose of Congress to permit ceding of jurisdiction in cases where the National Labor Relations Board has assumed jurisdiction of the parties and of the dispute in some prior case, to the end that the state agency may administer the statute in a case pending before it.

Argument

The word "cede" has been defined as meaning "to yield up; to assign; to grant. Generally used to designate the transfer of territory from one government to another." Black's Law Dictionary (Third Edition), at page 295. The language used in Section 10 (a) does not show a clear and manifest purpose to empower Congress to turn over to the states a jurisdiction over cases involving labor disputes where Federal authority has never been asserted. To the contrary, Congress intended to permit its agency to cede jurisdiction over cases or labor disputes where state administration was otherwise barred because Federal authority had been asserted in the particular case or labor dispute. By this permissible construction it becomes apparent that Congress has provided for concurrent jurisdiction, and has not prohibited it.

Mr. Justice Douglas says at pages 230, 231, of *Rice et al. v. Santa Fe Elevator Corporation et al.*, *supra*, that "It is often a perplexing question whether Congress has precluded state action or by the choice of selective regulatory measures has left the police power of the States undisturbed except as the state and federal regulations collide." The four cases cited in support of this proposition will bear analysis.

In *Townsend et al. v. Yeomans et al.*, 31 U.S. 441 454 (1937), it was held that the business of tobacco warehouses at which are conducted markets for public sales of tobacco, is affected with such a public interest that a Georgia statute fixing maximum charges for handling and selling leaf tobacco is not repugnant to the Fourteenth amendment when confiscation is not shown.

Argument

In *Kelly v. State of Washington, supra*, at pages 15, 16, it was held that a statute of the State of Washington relating to the inspection and regulation of vessels is valid in so far as it provides for the inspection of hull and machinery in order to insure safety and seaworthiness and as to other requirements which lie outside the bounds of federal action thus far taken, and as to which uniformity of regulation is not needed.

In *South Carolina State Highway Department et al. v. Barnwell Bros., Inc., et al.*, 303 U.S. 177 (1938), it was held that a South Carolina Statute limiting the width of certain trucks, as applied to motor vehicles operated in interstate commerce, was not an unreasonable burden on interstate commerce, since it could not be said that the width of trucks upon highways was unrelated to their safety and cost of maintenance. Hence it was held that the South Carolina statute did not infringe the Fourteenth Amendment.

In *Union Brokerage Co. v. Jensen et al., supra* at page 212, it was said by Mr. Justice Frankfurter that (italics ours):

*"The Commerce Clause does not deprive Minnesota of the power to protect the special interest that has been brought into play by Union's localized pursuit of its share in the comprehensive process of foreign commerce. * * * By its own force that Clause does not * * * preclude a State from giving needful protection to its citizens in the course of their contacts with business conducted by outsiders when the legislation by which this is accomplished is general in its scope, is not aimed at interstate or foreign commerce, and*

Argument

*involves merely burdens incident to effective administration. * * **

The four cases last cited make implied congressional intent dependent upon the character of the Federal statute and upon the public interest to be served by maintaining state administration under the state statute. Surely, when the Wisconsin Employment Peace Act declares in Section 111.01 (4) that "It is the policy of the state, in order to preserve and promote the interests of the public, the employee, and the employer alike, to establish standards of fair conduct in employment relations and to provide a convenient, expeditious and impartial tribunal by which these interests may have their respective rights and obligations adjusted. While limiting individual and group rights of aggression and defense, the state substitutes processes of justice for the more primitive methods of trial by combat," it is clear and certain that the Labor Management Relations Act, 1947, should not be held to impliedly evince an intent to strike down the Wisconsin statute or preclude its administration by the Wisconsin Employment Relations Board.

Argument

(6)

Wisconsin policy has not produced a result inconsistent with or repugnant to the objectives of the Labor Management Relations Act, 1947, in the instant case.

The Wisconsin statute, insofar as is applicable and material to the instant case, is Section 111.06 (2), clauses (a), (c), and (h), to be found on pages 53, 54 of this brief. When comparison of the unfair labor practices defined in the Wisconsin statute is made with the unfair labor practices defined in the Labor Management Relations Act, 1947, to be found on pages 48-52 of this brief, it is certain that no Wisconsin employer or employee is deprived of rights protected or granted by the Constitution of the United States or by the federal statute.

The judgment of the Court below should be affirmed for the same reasons that the judgment of the Supreme Court of Wisconsin was affirmed by Your Honorable Court in *Allen-Bradley Local No. 1111 etc., et al. v. Wisconsin Employment Relations Board et al., supra*, wherein it was said by Mr. Justice Douglas, at page 751 (Italics ours):

*** *Since the state system of regulation, as construed and applied here, can be reconciled with the federal Act and since the two as focused in this case can consistently stand together, the order of the state*

Argument

Board must be sustained under the rule which has long obtained in this Court. . . .

In sum, we cannot say that the mere enactment of the National Labor Relations Act without more excluded state regulation of the type which Wisconsin has exercised in this case. It has not been shown that any employee was deprived of rights protected or granted by the federal Act or that the status of any of them under the federal Act was impaired. Indeed if the portions of the state Act here invoked are invalid because they conflict with the federal Act, then so long as the federal Act is on the books it is difficult to see how any State could under any circumstances regulate picketing or disorder growing out of labor disputes of companies whose business affects interstate commerce."

Respectfully submitted,

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APPENDIX NO. 1

The pertinent provision of the Labor Management Relations Act, 1947, is Section 8, to be found in 29 U.S.C.A., Section 158 (pocket part), which is as follows:

Sec. 158. Unfair labor practices

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the information or administration of any labor organization or contribute financial or other support to it; Provided, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action

Appendix No. 1

defined in section 158 (a) of this title as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159 (a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in section 159 (e) of this title the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159 (a) of this title.

Appendix No. 1

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159 (a) of this title;

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer

Appendix No. 1

or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title; (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order of certification of the Board determining the bargaining representative for employees performing such work: Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter;

(5) to require of employees covered by an agreement authorized under subsection (a) (3) of this section the payment, as a condition precedent to becoming a member

Appendix No. 1

of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected; and

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed. * * *

APPENDIX NO. 2

The pertinent provision of the Wisconsin Employment Peace Act (Wisconsin Laws of 1939, Chapter 57, as amended) is Section 111.06 which defines unfair labor practices, as follows:

(1) It shall be an unfair labor practice for an employer, individually or in concert with others:

(a) To interfere with, restrain or coerce his employees in the exercise of the rights guaranteed in Section 111.04.

(b) To initiate, create, dominate or interfere with the formation or administration of any labor organization or contribute financial support to it, provided that an employer shall not be prohibited from reimbursing employees at their prevailing wage rate for time spent conferring with him, nor from cooperating with representatives of at least a majority of his employees in a collective bargaining unit, at their request, by permitting employee organizational activities on company premises or the use of company facilities where such activities or use create no additional expense to the company.

(c) 1 To encourage or discourage membership in any labor organization, employee agency, committee, association or representation plan by discrimination in regard to hiring, tenure or other terms or conditions of employment, * * *

Appendix No. 2

(d) To refuse to bargain collectively with the representative of a majority of his employees in any collective bargaining unit; provided, however, that where an employer files with the Board a petition requesting a determination as to majority representation, he shall not be deemed to have refused to bargain until an election has been held and the result thereof has been certified to him by the Board.

(e) To bargain collectively with the representatives of less than a majority of his employees in a collective bargaining unit, or to enter into an all-union agreement except in the manner provided in subsection (1) (c) of this section.

(f) To violate the terms of a collective bargaining agreement (including an agreement to accept an arbitration award).

(g) To refuse or fail to recognize or accept as conclusive of any issue in any controversy as to employment relations the final determination (after appeal, if any) of any tribunal having competent jurisdiction of the same or whose jurisdiction the employer accepted.

(h) To discharge or otherwise discriminate against an employee because he has filed charges or given information or testimony in good faith under the provisions of this chapter.

(i) To deduct labor organization dues or assessments from an employee's earnings, unless the employer has been presented with an individual order therefor, signed by the employee personally, and terminable at the end of

Appendix No. 2

any year of its life by the employee giving at least thirty days written notice of such termination.

(j) To employ any person to spy upon employees or their representatives respecting their exercise of any right created or approved by this chapter.

(k) To make, circulate or cause to be circulated a blacklist as described in Section 343.682.

(1) To commit any crime or misdemeanor in connection with any controversy as to employment relations.

(2) It shall be an unfair labor practice for an employee individually or in concert with others:

(a) To coerce or intimidate an employee in the enjoyment of his legal rights, including those guaranteed in Section 111.04, or to intimidate his family, picket his domicile, or injure the person or property of such employee or his family.

(b) To coerce, intimidate or induce any employer to interfere with any of his employees in the enjoyment of their legal rights, including those guaranteed in Section 111.04, or to engage in any practice with regard to his employees which would constitute an unfair labor practice if undertaken by him on his own initiative.

(c) To violate the terms of a collective bargaining agreement (including an agreement to accept an arbitration award).

(d) To refuse to fail to recognize or accept as conclusive of any issue in any controversy as to employment relations the final determination (after appeal, if any) of

Appendix No. 2

any tribunal having competent jurisdiction of the same or whose jurisdiction the employees or their representatives accepted.

(e) To cooperate in engaging in, promoting or inducing picketing (not constituting an exercise of constitutionally guaranteed free speech), boycotting or any other overt concomitant of a strike unless a majority in a collective bargaining unit of the employees of an employer against whom such acts are primarily directed have voted by secret ballot to call a strike.

(f) To hinder or prevent, by mass picketing, threats, intimidation, force or coercion of any kind the pursuit of any lawful work or employment, or to obstruct or interfere with entrance to or egress from any place of employment, or to obstruct or interfere with free and uninterrupted use of public roads, streets, highways, railways, airports, or other ways of travel or conveyance.

(g) To engage in a secondary boycott; or to hinder or prevent, by threats, intimidation, force, coercion or sabotage, the obtaining, use or disposition of materials, equipment or services; or to combine or conspire to hinder or prevent, by any means whatsoever, the obtaining, use or disposition of materials, equipment or services, provided, however, that nothing herein shall prevent sympathetic strikes in support of those in similar occupations working for other employers in the same craft.

(h) To take unauthorized possession of property of the employer or to engage in any concerted effort to interfere with production except by leaving the premises in an orderly manner for the purpose of going on strike.

Appendix No. 2

57

(i) To fail to give the notice of intention to strike provided in Section 111.11.

(j) To commit any crime or misdemeanor in connection with any controversy as to employment relations.

(1) To engage in, promote or induce a jurisdictional strike.

(3) It shall be an unfair labor practice for any person to do or cause to be done on behalf of or in the interest of employers or employees, or in connection with or to influence the outcome of any controversy as to employment relations any act prohibited by subsections (1) and (2) of this section.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1948

Nos. 14 and 15

INTERNATIONAL UNION, UNITED AUTOMOBILE
WORKERS OF AMERICA, A. F. OF L., LOCAL 232; AN-
THONY DORIA, CLIFFORD MATCHEY, WALTER
BERGER, ERWIN FLEISCHER, JOHN M. CORBETT,
OLIVER DOSTALER, CLARENCE EHLMANN, HERBERT
JACOBSEN, LOUIS LASS,

Petitioners,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E.
GOODING, HENRY RULE, and J. E. FITZGIBBON, as
Members of the Wisconsin Employment Relations Board; and
BRIGGS & STRATTON CORPORATION, a Corporation,

Respondents.

Brief Amicus Curiae of Wisconsin Manufacturers' As-
sociation, the Northeast Wisconsin Industrial
Association, and the Associated Industries
of Oshkosh.

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INDEX

	Page
Scope of Brief	2
Issue	2
Argument	3

SYNOPSIS OF ARGUMENT

Where Intra-State Activities Are Concerned, the Reserved Police Power of the State Will Be Sustained Unless There is a Clear Conflict With the Exercise of Constitutional Federal Power	3
Federal Acts Cannot Be Construed as Giving Protection to All Concerned Activities	5
The Activities Banned by the State Board Order Are Not Protected by the National Labor Relations Act	14
Congress, By the Passage of the National Labor Relations Act, Has Not Preempted the Entire Field of Regulation of Industrial Strife	18
There Is No Conflict Between the State Board's Order and the General Policies Enunciated in the Federal Labor Law	21
Conclusion	24

TABLE OF CASES CITED

Allen-Bradley Local 1111, et al. v. Wisconsin Employment Relations Board, et al., 315 U.S. 740	3, 4, 5, 6
Amalgamated Utility Workers, et al. v. Consolidated Edison Co. of New York, et al., 309 U.S. 261	8

American News Company, Inc., 55 N.L.R.B. 1302	14
Atchison Ry. v. Railroad Comm., 283 U. S. 380	20
Bethlehem Steel Company, et al. v. New York State Labor Relations Board, 330 U. S. 767	4, 7, 11
Brashear Freight Lines v. N.L.R.B., 119 F. 2d 379 (C. C. A. 8)	14
C. G. Conn, Ltd. v. N.L.R.B., 108 F. 2d 390 (C. C. A. 7)	16
Consolidated Edison Company of New York, Inc., et al. v. N.L.R.B. et al., 305 U. S. 197	19, 23
Leo H. Hill, et al. v. State of Florida, et al., 325 U. S. 538	7
Home Beneficial Life Insurance Company, Inc. v. N.L.R.B., 159 F. 2d 280 (C.C.A. 4)	11, 16
Hotel & Restaurant Employees International Alli- ance, Local No. 122, et al. v. Wisconsin Employ- ment Relations Board, et al., 315 U. S. 437	3
Maurer v. Hamilton, 309 U. S. 598	20
N.L.R.B. v. Columbia Enameling & Stamping Com- pany, Inc., 306 U. S. 292	14
N.L.R.B. v. Condenser Corporation of America, et al., 128 F. 2d 67 (C.C.A. 3)	17
N.L.R.B. v. Draper Corporation, 145 F. 2d 199 (C. C. A. 4)	12
N.L.R.B. v. Fansteel Metallurgical Corporation, 306 U. S. 240	9, 10, 13, 19

N.L.R.B. v. Indiana Desk Company, 149 F. 2d 987 (C. C. A. 7)	14
N.L.R.B. v. Jones & Laughlin Steel Corporation, 301 U. S. 1.	4
N.L.R.B. v. Mackay Radio & Telegraph Company, 304 U. S. 333	11
N.L.R.B. v. Montgomery Ward & Co., Inc., 157 F. 2d 486 (C.C.A. 8)	15
N.L.R.B. v. Mount Clemens Pottery Company, 147 F. 2d 262 (C.C.A. 6)	16
Sinnot v. Davenport, 22 How. 227	7
Southern Steamship Company v. N.L.R.B., et al., 316 U. S. 31	12, 13

STATUTES CITED

<i>Labor-Management Relations Act</i>	
Section 1	18, 21
Section 13	20
<i>National Labor Relations Act</i>	
Section 1	14, 18, 21
<i>Wisconsin Employment Peace Act</i>	
Section 111.01	22
Section 111.04	22

CONGRESSIONAL REPORTS

House Report, 510, 80th Congress	20
----------------------------------	----

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sociation, the Northeast Wisconsin Industrial
Association, and the Associated Industries
of Oshkosh.

The Wisconsin Manufacturers' Association, the North-
east Wisconsin Industrial Association, and the Associated
Industries of Oshkosh respectfully submit this brief as
amicus curiae. These Associations—organizations whose
members are employers—file this brief in support of an
order issued by the Wisconsin Employment Relations
Board, which was approved and enforced by the Wis-
consin Supreme Court.

SCOPE OF BRIEF

This brief will be concerned solely with the question as to whether or not the order of the Wisconsin Employment Relations Board, as construed by the Wisconsin Supreme Court, prohibiting the Petitioners from "engaging in concerted activities to interfere with production by arbitrarily calling union meetings and inducing work stoppages during regularly scheduled working hours" infringes on rights guaranteed employees by the National Labor Relations Act.

These Associations contend that neither the National Labor Relations Act of 1935 nor the National Labor Relations Act as amended by the Labor-Management Relations Act of 1947 grant federal protection to the type of activities condemned by the order here under review. It is admitted that, if the order of the Wisconsin Employment Relations Board denies to Petitioners the exercise of rights guaranteed by federal law, the order should not be enforced.

ISSUE

The activities prohibited by the order of the State Board involve a concerted union-sponsored program of repeated absences during working hours for short periods without notice to or consent by the employer. The announced purpose of the absences was to attend union meetings. The admitted objective in calling union meetings during working hours was to interfere with production. These activities, for purposes of brevity, will be referred to hereafter as "unauthorized absences."

The order of the State Board, as construed by the Supreme Court, prohibits Petitioners "from engaging

in concerted effort to interfere with production by *doing the acts instantly involved.*" (Emphasis supplied). This Court has held that:

"Since Wisconsin has applied . . . only parts of the state Act, the conflict with the policy or mandate of the federal Act must be found in those parts." (*Allen-Bradley Local 1111, et al. v. Wisconsin Employment Relations Board, et al.*, 315 U. S. 740, p. 750)

This Court also has recognized that the highest court of the state:

" . . . has of course, the final say concerning the meaning of a Wisconsin law and the scope of administrative orders made under it." (*Hotel & Restaurant Employees International Alliance, Local No. 122, et. al v. Wisconsin Employment Relations Board, et al.*, 315 U. S. 437, p. 440)

Hence, the narrow issue presented is whether or not these unauthorized absences constitute an activity protected by the National Labor Relations Act.

ARGUMENT

Where Intra-State Activities are Concerned, the Reserved Police Power of the State Will Be Sustained Unless There is a Clear Conflict With the Exercise of Constitutional Federal Power.

This employer is not an instrument of commerce and is not engaged directly in interstate or foreign commerce. The activities here involved were clearly of a character subject to state regulation. The subject matter of the state's order:

" . . . is not so intimately blended and intertwined with responsibilities of the national government

that its nature alone raises an inference of exclusion. Cf. *Hines v. Davidowitz*, 312 U. S. 52, 66." (*Bethlehem Steel Company, et al. v. New York State Labor Relations Board*, 330 U. S. 767, p. 772).

By the prohibition of the activities here involved, in the absence of conflicting federal legislation, the state did not impinge on constitutionally-granted federal power.

This Court, in a case involving another section of the Wisconsin Employment Peace Act dealing with picketing, violence, etc., clearly enunciated this principle when it stated:

"We agree with the statement of the United States as amicus curiae that the federal Act was not designed to preclude a State from enacting legislation limited to the prohibition or regulation of this type of employee or union activity." (*Allen-Bradley case, supra*, p. 748)

Congress is under no constitutional compulsion to regulate interstate commerce in a manner which embraces all of the evils in a particular field within its reach. (*National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301, U. S. 1, p. 46). Where both state and federal governments have the power to legislate in a particular field and the federal legislation is of limited scope, the federal intent to exclude state power must clearly be manifested. (*Allen-Bradley case, supra*, pp. 748-749). The National Labor Relations Act is of limited scope, leaving unregulated "other closely related matters." (*Bethlehem Steel case, supra*, p. 773)

This Court has defined the scope of the Wagner Act as follows:

"Sec. 7 of the federal Act guarantees labor its 'fundamental right' (*National Labor Relations*

Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 33) to self-organization and collective bargaining. Sec. 8 affords employees protection against unfair labor practices of employers including employer interference with the rights secured by Sec. 7. Sec. 9 affords machinery for providing appropriate collective bargaining units. And Sec. 10 grants the federal Board 'exclusive' power of enforcement." (*Allen-Bradley case, supra*, p. 750)

These rights were not expanded in any sense material to these proceedings in the Labor-Management Relations Act of 1947.

It already has been pointed out that the order of the State Board, as construed by the Wisconsin Supreme Court, has limited application. The assumption of a broader application than is warranted under the Supreme Court's decision is not a proper ground for setting aside the order. This Court, in referring to the rights guaranteed under the federal statute, has stated:

"It is not sufficient, however, to show that the State Act might be so construed and applied as to dilute, impair, or defeat those rights." (*Allen-Bradley case, supra*, p. 750)

It is submitted that the activities enjoined by the state order, while they are admittedly concerted activities, did not impair the rights guaranteed by the federal statute to employees "to self-organization and collective bargaining." As will be pointed out in greater detail later, all concerted activities are not protected by the federal statutes. The right of employees to indulge in a program of concerted unauthorized absences is not fundamental to the enjoyment of the rights protected by the federal statutes. There is nothing in the state's order which affects the status of employees or forfeits collective bar-

gaining rights. The collective bargaining activities encouraged by Congress remain open to the Petitioners. As this Court stated in the *Allen-Bradley case*:

"And we fail to see how the inability to utilize mass picketing, threats, violence, and the other devices which were here employed impairs, dilutes, qualifies or in any respect subtracts from any of the rights guaranteed and protected by the federal Act. Nor is the freedom to engage in such conduct shown to be so essential or intimately related to a realization of the guarantees of the federal Act that its denial is an impairment of the federal policy. If the order of the state Board affected the status of the employees or if it caused a forfeiture of collective bargaining rights, a distinctly different question would arise. But since no such right is affected, we conclude that this case is not basically different from the common situation where a State takes steps to prevent breaches of the peace in connection with labor disputes. Since the state system of regulation, as construed and applied here, can be reconciled with the federal Act and since the two as focused in this case can consistently stand together, the order of the state Board must be sustained under the rule which has long obtained in this Court. See *Sinnot v. Davenport*, 22 How. 227, 243." (*Allen-Bradley case, supra*, pp. 750-751)

We submit that the same rule applies to the activities prohibited by the state in this case.

It must be demonstrated, and not merely assumed, that the exercise of the right to bargain collectively, as guaranteed in the federal law, requires that employees have the right to undertake a concerted program of repeated unauthorized absences. The conflict between the State Board's order and the federal law:

"... should be so direct and positive so that the two acts could not be reconciled or consistently stand together." (*Sinnot v. Davenport*, 22 How. 227, 243)

This situation is not similar to that involved in the *Hill v. Florida case*. This Court construed the legislation, ruled unconstitutional in that case, in the following language:

"It is apparent that the Florida statute has been so construed and applied that the union and its selected representative are prohibited from functioning as collective bargaining agents, or in any other capacity, except upon conditions fixed by Florida." (*Leo H. Hill, et al., v. State of Florida, et al.*, 325 U.S. 538. P. 541)

The order of the Wisconsin Board in this case has not been so construed and is not susceptible of such a construction. The record in this case shows that the union could and did, through its officers and agents, function as collective bargaining representative. There is nothing in the order to prevent it from continuing to do so.

This case, unlike the *Bethlehem Steel case*, presents no possibility of conflict between federal and state agencies in the administration of similar state and federal legislation. The activities of the type banned by the State Board are neither specifically protected nor denounced by federal law. The amendments contained in the Labor-Management Relations Act of 1947 do not give an employer or an employee the right to file an unfair labor practice charge with the National Labor Relations Board complaining of such activities, unless other factors are involved. There is no provision in the federal law comparable to the one on which the state order was based. Hence, there is no possibility of a conflict in administration.

Federal Acts Cannot Be Construed as Giving Protection to All Concerted Activities.

The provisions of Section 7 in the federal act did not create new rights, but provided federal protection for existing rights. This Court, in commenting on the specific provisions contained in Section 7 of the Wagner Act, stated :

"Neither this provision, nor any other provision of the Act, can properly be said to have 'created' the right of self-organization or of collective bargaining through representatives of the employees' own choosing. In *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U. S. 1, 33, 34, we observed that this right is a fundamental one; that employees 'have as clear a right to organize and select their representatives for lawful purposes' as the employer has 'to organize its business and select its own officers and agents';" (*Amalgamated Utility Workers, et al. v. Consolidated Edison Co. of N. Y., et al.*, 309 U. S. 261, p. 263)

It hardly can be contended that employees, prior to the passage of the Wagner Act, had the fundamental right to indulge in the activities condemned by the order in this case.

The right of employees to bargain through representatives and to engage in concerted activities for their mutual aid and protection, as guaranteed by federal law, assumes that such activities must be exercised in such a manner as will not impair the fundamental rights of others. The courts, in many instances, while construing and applying this legislation, have indicated clearly that the mere fact that the particular activity is indulged in by two or more employees on a concerted basis does not make an otherwise unlawful act lawful.

This Court has stated:

"The conduct thus protected is *lawful conduct*. Congress also recognized the right to strike—that the employees could lawfully cease work at their own volition because of the failure of the employer to meet their demands. Section 13 provides that nothing in the Act 'shall be construed so as to interfere with or impede or diminish in any way the right to strike.' But this recognition of 'the right to strike' plainly contemplates a lawful strike—the exercise of the unquestioned right to quit work." *National Labor Relations Board v. Fansteel Metallurgical Corporation*, 306 U. S. 240, pp. 255-256). (Emphasis supplied)

The order of the Board in this particular case does not deprive Petitioners of "the exercise of the unquestioned right to quit work." Furthermore, the activities were found to be *unlawful* under the law of the State of Wisconsin.

While employees have the unquestioned right to strike by leaving their employment to enforce their demands, the legislative protection granted to this right in the National Labor Relations Act did not deprive the employer of his right to continue operating his business if he could secure other employees. If the activities involved in this case were protected activities under the federal law, there is no way for this employer to overcome the adverse effect on production caused by the periodic unauthorized absences. The employer is just as effectively denied the use of his property during these absences as if the employees remain on the premises but refuse to perform any work. If these unauthorized absences are protected activities, the employer cannot discharge the employees and replace them with new em-

employees. The result is the same as if the employees engage in a sitdown strike. This Court, in the *Fansteel case*, made it clear that such activities were not protected activities under the federal act. The Court, in referring to the sitdown strike, stated that:

"This was not the exercise of 'the right to strike' to which the Act referred. *It was not a mere quitting of work and statement of grievances in the exercise of pressure recognized as lawful.* It was an illegal seizure of the buildings in order to prevent their use by the employer in a lawful manner and thus by acts of force and violence to compel the employer to submit. When the employees resorted to that sort of compulsion, they took a position outside the protection of the statute and accepted the risk of the termination of their employment upon grounds aside from the exercise of the legal rights which the statute was designed to conserve." (*Fansteel case, supra*. Pp. 256-257) (Emphasis supplied)

Moreover, this Court has consistently held that employees engaging in a *legal* strike, not caused by unfair labor practices, are not protected in these activities to the extent of having an absolute right to their jobs whenever they cease their striking. This ruling recognized that, while the employees had a right to strike, the employer had an equal right to conduct his business by employing other employees if they were available. This rule was laid down in the *Mackay Radio case*, wherein this Court stated:

"Although Section 13 provides, 'Nothing in this Act shall be construed so as to interfere with or impede, or diminish in any way the right to strike,' it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to dis-

charge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them." (*National Labor Relations Board v. Mackay Radio & Telegraph Company*, 304 U.S. 333. Pp. 345-346)

An employee indulging in activities unlawful by state standards should be in no better position.

The Fourth Circuit Court of Appeals, in a more recent case, applying the principle established in the *Fansteel case* to a situation involving another type of concerted activity, held that, when employees:

"... refuse to obey the rules laid down by a law-abiding management for the conduct of the business, they may be discharged and their places may be permanently filled." (*Home Beneficial Life Insurance Company, Inc. v. National Labor Relations Board*, 159 F. 2d 280. P. 284.)

If an employee can be discharged for engaging in a type of concerted activity not protected by the federal law, there can be no conflict between state and federal power where the state restrains employees from indulging in such activities. As this Court stated in the *Bethlehem Steel case*, *supra*:

"Where it (The Congress) leaves the employer-employee relation free of regulation in some aspects, it implies that in such matters federal policy is indifferent, and since it is indifferent to what the individual of his own volition may do we can only assume it to be equally indifferent to what he may do under the compulsion of the state." (P. 773)

The Petitioners in this case seem to contend that, so long as employees act in concert, they are protected under the National Labor Relations Act from discipline by

their employer and from restraint imposed by the state. The First Circuit Court of Appeals, in the *Draper Corporation case*, most aptly negated this contention when it stated:

"The purpose of the Act was not to guarantee to employees the right to do as they please but to guarantee to them the right of collective bargaining for the purpose of preserving industrial peace." (*National Labor Relations Board v. Draper Corporation*, 145 F. 2d 199. P. 203) *

If every type of concerted activity were protected by federal law, then local law enforcement officers would be helpless to prevent the holding of a union meeting in the middle of a busy thoroughfare, or for that matter, a state court to grant redress to a property owner whose property had been used without his approval for such a purpose. The courts have refused to come to such an absurd conclusion. This Court rather brusquely reminded the National Labor Relations Board of the necessity of administering the statute in a manner which gives recognition to the rights of others.

"Frequently, the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task." (*Southern Steamship Company v. National Labor Relations Board, et al.*, 316 U.S. 31. P. 47)

This Court, in that case, held that mutiny on the high seas was not a type of concerted action protected by the Wagner Act, and that such activities were not essential to the enjoyment of the rights guaranteed employees by that law. The type of activities banned by the state order

in this case are no more necessary to the enjoyment of the rights guaranteed by the National Labor Relations Act than is the right to strike aboard ship in violation of the Federal Mutiny Act. The Court, in the *Southern Steamship case*, *supra*, stated:

"... nothing that we have said would prevent the union from striking, picketing or resorting to any other means of self-help, so long as the time and place it chooses do not come within the express prohibition of Congress." (P. 49)

Likewise in this case, the employees are not prohibited from striking or indulging in other self-help which does not come within the express prohibition of the state statute.

It may be argued that the condemned activity in the *Southern Steamship case* was unlawful because of Congressional enactment and that the same reasoning does not apply to activities declared unlawful by a state. This Court has not made that distinction. In the *Fansteel case*, *supra*, where the employer admittedly had violated the Wagner Act, this Court, in refusing to reinstate certain employees who had violated state law, said:

"The affirmative action that is authorized is to make these remedies effective in the redress of the employees' rights, to assure them self-organization and freedom in representation, not to license them to commit tortious acts or to protect them from the appropriate consequences of unlawful conduct." (P. 258). (Emphasis supplied)

The unlawful conduct in that case was the forceful seizure of the employer's property and the failure to comply with an order of a state court. The "tortious acts" and "unlawful conduct" were not given legal status

under the federal law simply because employees engaged in such activities in concert for their own mutual aid and protection.

Other types of concerted activities which have been held not to be within the protection of the National Labor Relations Act are minority strikes (*Draper Corp., supra*, and *Brashear Freight Lines v. National Labor Relations Board*, 119 F. 2d 379); a strike in violation of a collective bargaining agreement (*National Labor Relations Board v. Columbian Enameling and Stamping Company, Inc.*, 306 U.S. 292); a strike prosecuted to compel an employer to grant an illegal wage increase (*American News Company, Inc.*, 55 N.L.R.B., 1302); a strike conducted in such a manner as to deny the employer the use of his plant (*National Labor Relations Board v. Indiana Desk Company*, 149 F. 2d 987); etc.

The foregoing decisions logically recognize that actions which impair the personal and property rights of others, even though done in concert, whether unlawful under state or federal law, are not within the protection of the National Labor Relations Act.

The Activities Banned by the State Board Order Are Not Protected by the National Labor Relations Act.

The highest court in the State of Wisconsin has found that these unauthorized absences were an unlawful activity under state law. It is admitted that the employees in leaving their employment did not intend to strike. Section 3 of the National Labor Relations Act defines the term "employee" as including "any individual whose work has ceased as a consequence of, or in connection

with, any current labor dispute, or because of any unfair labor practice." This definition lends color to Section 13, wherein "the right to strike" is preserved. The employees in this case did not "cease work." They, as directed by Petitioners, "took the day off." Petitioners are not prohibited from striking by the order.

It already has been pointed out that all types of concerted activities have not been recognized as within the range of the activities protected by Section 7. The remaining issue is whether or not this particular activity—namely, this series of concerted unauthorized absences—constitutes a protected activity.

The question put otherwise is: Does the National Labor Relations Act give employees the right to remain in the active employ of an employer under conditions unilaterally determined by the employees? This question does not involve the issue as to whether or not the employees may go on strike by quitting their employment in support of their demand for a change in wages, hours, or working conditions. The Petitioners in this case admittedly, and as found by the Supreme Court of the State of Wisconsin, did not go out on strike.

The Eighth Circuit Court of Appeals, in the *Montgomery Ward* case, stated the rule aptly in the following words:

"While these employees had the undoubted right to go on a strike and quit their employment, they could not continue to work and remain at their positions, accept the wages paid to them, and at the same time select what part of their allotted tasks they cared to perform of their own volition, or refuse openly or secretly, to the employer's damage, to do other work." (*National Labor Relations Board v. Montgomery Ward & Co., Inc.*, 157 F. 2d 486. P. 496)

It is submitted that there is little difference between a situation where an employee decides for himself what tasks he shall perform and one where an employee decides when he shall perform them. As stated in the *Hopie Beneficial Life Insurance Company case*, *supra*, when employees:

"... refuse to obey the rules laid down by a law-abiding management for the conduct of the business, they may be discharged and their places may be permanently filled." (P. 284)

If the employer has the right to discharge in such cases, then obviously, the activity is not a protected activity under the federal act.

The Seventh Circuit Court of Appeals applied the same line of reasoning in a situation where a group of employees refused to work the hours prescribed by the employer. The Court stated:

"We are aware of no law or logic that gives the employee the right to work upon terms prescribed solely by him. That is plainly what was sought to be done in this instance. It is not a situation in which employees ceased work in protest against conditions imposed by the employer, but one in which the employees sought and intended to continue work upon their own notion of the terms which should prevail. If they had a right to fix the hours of their employment, it would follow that a similar right existed by which they could prescribe all conditions and regulations affecting their employment." (*C. G. Conn, Ltd. v. National Labor Relations Board*, 108 F. 2d 390. P. 397)

(See also *National Labor Relations Board v. Mount Clemens Pottery Company*, 147 F. 2d 262)

The Third Circuit Court of Appeals, following the line established in the *Conn case*, *supra*, stated:

"Employees cannot insist that their demands be met in the middle of a working day, when the employer has promised to deal with them as a group at the end of the day." (*National Labor Relations Board v. Condenser Corporation of America, et al.*, 128 F. 2d 67. P. 77)

In the instant case, the employees likewise sought to determine for themselves the hours of work.

The foregoing cases recognize the industrial realities in this type of situation. If two or more employees, acting in concert, have a right under federal law to determine unilaterally the hours during which they shall remain on the job, it will become next to impossible to operate an industrial enterprise. If such unauthorized absences are a type of protected activity under the federal statute, then two employees at a time, or all of them, may take time off whenever they choose, provided such action may be construed as being for the employees' "mutual aid and protection." The union could refine this technique and simply call out the employees in a key department, which would necessitate the laying off of the employees in other departments, and thus shut down the whole plant for short periods. If this is a protected activity, then the employer is defenseless in the face of these tactics. He cannot discharge or discipline the offending employees, nor can he replace them with other employees.

There is nothing in the National Labor Relations Act to indicate that Congress intended to transfer the responsibility for directing the working force from the management selected by the stockholders to the bargaining agent selected by the employees. Nor could Congress constitutionally have done so. Had Congress considered that such an arrangement would encourage the free flow

of commerce, Congress would undoubtedly have used language other than that employed in Section 7. The contention of the union in this case is really to the effect that what admittedly constituted an act of insubordination before the passage of the National Labor Relations Act became the right of employees, free from the hazard of discipline or regulation, after the passage of the Act. It is noteworthy to point out that the Petitioners do not concede that this employer had the right to discipline employees indulging in such unauthorized absences. If that be the case, then Congress has in effect changed our whole industrial structure by the mere passage of a law guaranteeing to employees the right to bargain collectively through a labor union. The decisions of this Court and other federal courts referred to previously indicate the absurdity of such a contention.

Congress, By the Passage of the National Labor Relations Act, Has Not Preempted the Entire Field of Regulation of Industrial Strife.

In the original National Labor Relations Act, and in the Labor-Management Relations Act of 1947, the Congressional policy was stated to be:

"... eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining..." (Section 1)

Both of these laws listed in Section 8 specific unfair labor practices which were to be eliminated, and authorized the National Labor Relations Board to undertake certain means to eliminate the specified unfair labor practices. Congress was primarily concerned with *eliminating* the causes which *lead* to industrial strife.

"Congress was entitled to provide reasonable preventive measures and that was the object of the National Labor Relations Act . . ." (*Consolidated Edison Company of New York, Inc., et al. v. National Labor Relations Board, et al.*, 305 U.S. 197, P. 222)

The very machinery provided in the National Labor Relations Act indicates that Congress could not have intended to rely on this legislation to *terminate* strikes which were hampering commerce, except in a few specified instances included in the Labor-Management Relations Act. Further, it is clear that Congress intended to leave to the states the maintenance of law and order and the protection of personal and property rights which may become involved as a result of an industrial dispute.

We have already seen where this Court, in the *Fansteel* case, recognized that unlawful activities incident to a strike were not a protected activity under the National Labor Relations Act. Congress confirmed this decision by an amendment contained in Section 13 of Title 1 of the Labor-Management Relations Act. This section, as now constituted, reads as follows:

"Nothing in *this Act*, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to *affect the limitations or qualifications on that right*." (Emphasis supplied)

Had Congress intended to exclude the states from the regulation of industrial disputes, it would not have specified "nothing in this Act." The right of the states to impose additional limitations is recognized by the language "or to affect the limitations or qualifications on that right." Unless Congress intended to leave to the states the right to act in this field, this language is purposeless, since other language in this section already re-

fers to the limitations contained in the Labor-Management Relations Act. The Conference Report of the House of Representatives stated that this language recognizes:

"... that the right to strike is not an unlimited and unqualified right."—(*House Report*, 510, Eightieth Congress. P. 59)

Hence, even assuming the banned activities were considered a form of strike, it is submitted that the Board's order is no more than a reasonable limitation within the purview of Section 13 of the Labor-Management Relations Act.

We have already pointed out that the order of the State Board can be reconciled with the rights guaranteed to employees under federal law. In view of the fact that the right to indulge in unauthorized absences is not essential to the enjoyment of the rights of self-organization and bargaining through representatives as protected in the federal statute, the requirement that the inconsistency with federal law must be clear is not met. (*Maurer v. Hamilton*, 309 U.S. 598) Congress, having determined to occupy a limited field in the regulation of industrial strife, the implication is that the state may regulate activities not within the orbit of the federal legislation. This Court has stated this rule in the following language:

"The principle thus applicable has been frequently stated. It is that the Congress may circumscribe its regulation and occupy a limited field, and that the intention to supersede the exercise by the State of its authority as to matters not covered by the federal legislation is not to be implied unless the Act of Congress fairly interpreted is in conflict with the law of the State." (*Atchison Ry. v. Railroad Comm.*, 283 U.S. 380. Pp. 392-393).

If engaging in unauthorized absences is not protected by federal law, it then must follow that the National Labor Relations Act cannot justify the nullification of the State Board's order:

**There Is No Conflict Between the State Board's Order
and the General Policies Enunciated in the
Federal Labor Law:**

The following statement of Congressional policy is contained as Section 1 in both the National Labor Relations Act of 1935 and the amendments thereto contained in the Labor-Management Relations Act of 1947:

"It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." (Section 1)

In the Labor-Management Relations Act of 1947, the Congress found that:

"Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed." (Section 1)

The Wisconsin Employment Peace Act provides in part as follows:

"Negotiation of terms and conditions of work should result from voluntary agreement between employer and employee. For the purpose of such negotiation, an employee has the right, if he desires, to associate with others in organizing and bargaining collectively through representatives of his own choosing without *intimidation* or coercion from any source." (Section 111.01)

Section 111.04 of the state statute defines "rights of employees" as follows:

"Employees shall have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection; and such employees shall also have the right to refrain from any or all of such activities."

The foregoing language is almost identical with that contained in Section 7 of the Labor-Management Relations Act. Both the federal Congress and the state legislature were concerned with removing obstructions to continued production and the free flow of commerce. Both sought to accomplish this end by defining certain acts as unlawful and authorizing an administrative agency to prevent such unfair labor practices. The National Labor Relations Act of 1935 sought to eliminate only certain practices committed by employers. The Wisconsin Employment Peace Act of 1939 sought to protect the same employee rights, but went beyond the scope of the Wagner Act and denounced certain coercive employee activities as unfair labor practices. The Labor-Management Relations Act of 1947, also denounced

certain union activities as unfair labor practices. The broad policies of the two federal statutes and the state law are identical; that is, to provide peaceful means for settling labor disputes. This Court, in the *Fansteel case*, defined the fundamental policy of the Wagner Act in the following language:

"We repeat that the fundamental policy of the Act is to safeguard the rights of self-organization and collective bargaining, and thus by the promotion of industrial peace to remove obstructions to the free flow of commerce as defined in the Act. There is not a line in the statute to warrant the conclusion that it is any part of the policies of the Act to encourage employees to resort to force and violence in defiance of the law of the land. *On the contrary, the purpose of the act is to promote peaceful settlements of disputes by providing legal remedies for the invasion of the employees' rights.*" (*Fansteel case, supra*. Pp. 257-258). (Emphasis supplied)

There is nothing in the record in this case to indicate that this employer has invaded employee rights. There is ample evidence that the activities banned by the State Board created obstructions to the free flow of commerce. While Congress did not seek to control the particular activity here involved, certainly the state, by removing such an obstruction, is not violating the broad policies of the federal statutes. This Court has held that:

"... the fundamental purpose of the Act (Wagner) is to protect interstate and foreign commerce from interruptions and obstructions caused by industrial strife." (*Consolidated Edison Company case, supra*. P. 237)

The prohibition of the activities involved in this case is consonant with the federal policy of removing obstructions to interstate commerce.

CONCLUSION

The narrow issue presented by this brief, is whether or not the order of the Wisconsin Employment Relations Board, restraining Petitioners from committing certain acts herein described as unauthorized absences, denies to Petitioners the right to exercise the rights guaranteed by the National Labor Relations Act. Congress, in the National Labor Relations Act, exercised its power to regulate interstate commerce to a limited extent. This being the case, it cannot fairly be implied that Congress intended to preempt the whole field of labor relations. The guarantee to employees of the right to engage in concerted activities has not been construed to legalize all concerted activities. It is not necessary that employees have the right to engage in the unauthorized absences condemned by the State Board's order in order to enjoy the rights as guaranteed by the federal law. There being no clear conflict between the State Board's order, and Section 7 of the National Labor Relations Act, the State Board's order should stand. Furthermore, the banning of these unauthorized absences is consonant with the broad federal policy of removing obstructions to interstate commerce. Section 13 of the Labor-Management Relations Act of 1947 negates any inference that Congress intended to remove the states completely from the field of regulating industrial strife.

Wherefore, it is respectfully submitted that the decision of the Supreme Court of the State of Wisconsin should be sustained.

Respectfully submitted,

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October, 1948.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

Nos. 14 and 15

INTERNATIONAL UNION, UNITED AUTOMOBILE WORKERS OF AMERICA, A. F. L., LOCAL 232; ANTHONY DORIA, CLIFFORD MATCHEY, WALTER BERGER, ERWIN FLEISCHER, JOHN M. CORBETT, OLIVER DOSTALER, CLARENCE EHLMANN, HERBERT JACOBSEN, LOUIS LASS,

Petitioners,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, HENRY RULE and J. E. FITZGIBBON, as MEMBERS OF THE WISCONSIN EMPLOYMENT RELATIONS BOARD; and BRIGGS & STRATTON CORPORATION, a Corporation,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF
WISCONSIN

PETITION FOR REHEARING

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INDEX

SUBJECT INDEX

	Page
Petition for Rehearing.....	1
Argument	1

I.

The opinion of the court rejects the finding of the Wisconsin Board and both Wisconsin Courts respecting the objective of the work stoppages..... 1

II.

The unwarranted rejection of the findings of the Wisconsin Board and courts led this court to overlook the undisputed fact that the National Labor Relations Board and the Federal courts hold temporary work stoppages for the objective here involved to be protected by Section 7 of the National Act..... 6

III.

The court erroneously assumed that the National Board does not protect the right of employees to engage in temporary work stoppages of the kind here involved but merely shields employees who engage in them from discharges motivated by anti-union animus..... 11

IV.

The court's opinion rests on the erroneous premise that because the Act does not protect, against state interference, all activities in aid of collective bargaining merely because they are concerted, the activities here involved are not within the area affirmatively guaranteed... 13

V:

The Court erred in holding that under the Federal Act the Federal Board has no authority either to investigate or approve the union conduct in question. 19

Table of Cases Cited

Allen-Bradley Co. v. Local Union 3, 325 U. S. 797. . .	15
Allen-Bradley, Local 1111 v. Wisconsin Employment Relations Board, et al 315 U. S. 740.	13, 16
American Manufacturing Co. 7 N. L. R. B. 753, 132 F. (2d) 750, (C. C. A. 5).	12
Armour & Co., 25 N. L. R. B. 989.	11, 15
C. G. Conn., Ltd., v. N. L. R. B., 108 F. (2d) 390, (C. C. A. 7th).	7, 8, 10
Cudahy Packing Co., 29 N. L. R. B. 837.	9, 11
Harnischfeger Corp., 9 N. L. R. B. 676.	9, 11, 12, 15, 17
Hill v. Florida, 325 U. S. 538.	13, 14, 16
Home Beneficial Life Ins. Co. v. Labor Board, 159 F. (2d) 280.	7, 8, 10
Hotel & Restaurant Employees etc., v. Wisconsin Employment Relations Board, 315 U. S. 437. . .	4
Labor Board v. Condenser Corp., 128 F. (2d) 67, (C. C. A. 3).	8
Labor Board v. Draper Corp., 145 F. (2d) 199, (C. C. A. 4).	8

	Page
Labor ^a Board v. Indiana Deck Co., 149 F. (2d) 987, (C. C. A. 7).....	8
Labor Board v. Sands Mfg. Co., 306 U. S. 332.....	16
National Labor Relations Board v. Republic Avia- tion Corp., 324 U. S. 793.....	12
N. L. R. B. v. Fansteel Metallurgical Corp., 306 U. S. 240.....	16
N. L. R. B. v. Kalamazoo Stationary Co., 160 F. (2) 465, (C. C. A. 6).....	10
Southern S. S. Co. v. Labor Board, 316 U. S. 31..	16, 17

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PETITION FOR REHEARING

Now come Petitioners; and pursuant to leave granted by Mr. Justice Jackson, on March 11, 1949, respectfully move this Honorable Court to grant a rehearing in the above captioned case, in which opinion was entered on February 28, 1949. In support thereof petitioners show to this Honorable Court as follows:

I

The Opinion of the Court Rejects the Finding of the Wisconsin Board and Both Wisconsin Courts Respecting the Objective of the Work Stoppages.

The Wisconsin Board found that the purpose of the work stoppages was to induce the employer "to accede to the demands of the union to be included in the collective bargaining agreement being negotiated be-

tween the parties" (R. 16). It further found that the "respondent union and the individual respondents have publicly stated" their intent to continue such stoppages "for the purpose of inducing and coercing the complainant into compliance with their demands" (*ibid.*).

In its Memorandum accompanying its Findings of Fact, Conclusions of Law and Order, the Wisconsin Employment Relations Board pointed out that

"Negotiations continued between the parties and were being carried on on November 6, 1945. On that day, the union commenced the practice of exerting economic pressure on the employer in an attempt to compel the employer to accede to requests made by the union. This pressure was exerted by a series of short work stoppages. . . ." (R. 19).

The Wisconsin Board also stated in its Memorandum:

"The officers of the Union publicly stated that such work stoppages constituted a new labor weapon and that they were instigated and carried on at the direction of the union and for the expressed purpose of attempting to compel the employer to accede to union demands." (*ibid.*).

The Circuit Court of Milwaukee County found that the work stoppages were undertaken "for the purpose of enforcing compliance with demands made on the employer" (R. 6, 3); that "the employees attempted to secure the attainment of a lawful object, to wit, a collective bargaining agreement which would contain an improvement in the terms and conditions of their employment" (R. 8); that the specific demands which the union sought to obtain through the stoppages were those which the union had insisted upon in negotiations with the employer (R. 6-7); and that these facts were not obscured by the absence of "formal demand" made to the employer "before each walkout." (R. 6).

The Supreme Court of Wisconsin, after pointing out that "the evidentiary facts are not in dispute" (R. 106), and that "collective bargaining was in process to fix the terms of a new agreement" (R. 107), found that the

purpose of the walkouts was "to compel the company to comply with the union's demands respecting the terms of the contract being negotiated" (R. 107).

The uncontradicted evidence in the record shows that the object of the stoppages was to induce the employer to agree to the union's demands respecting some 19 issues in dispute between the parties (R. 47); demands which, on March 24, 1945, a panel of the 6th Regional War Labor Board had upheld, and which, on August 30, 1945, the 6th Regional Board itself had ordered the company to accept (R. 34). The uncontradicted evidence further shows that the work stoppages were undertaken on November 6th when "it became evident that the Company would not comply" with this directive of the Regional Board (R. 47); and that "the objective was to bring economic pressure against the company to force the company to agree to the directive of the board" (*ibid.*).

There is not a scintilla of evidence in the record that the employer was not constantly and entirely aware that it could avoid the stoppages by accepting the directive order of the Regional Board. Indeed, the employer's own testimony shows his understanding that the union was willing to enter into a contract prohibiting all strikes and stoppages upon the employer's acceptance of the Regional Board's directive (R. 43-44). And the Vice-President of the corporation, who was in charge of negotiating the labor agreement with the union, admitted that he was informed many times since the commencement of the stoppages

"that if *certain* demands with the union were not acceded to there would be further walkouts." (R. 40)

In the face of these findings of three Wisconsin tribunals and the unequivocal evidence on which they rest this Court's opinion nevertheless states (slip op. p. 3):

"The employer was not informed during this period of any specific demands which these tactics

were designed to enforce nor what concessions it could make to avoid them.

“6. Petitioners suggest, that the stoppages were initiated to force the employer to comply with a War Labor Board directive. However, the stoppages began several weeks before that directive reached either the union or the employer. By the latter date the War Labor Board had been abolished. Consequently the issuance of the directive would not seem to throw any light on the Union's motives * * *.”

It is obvious, of course, that the stoppages which began on November 6, 1945, could not have been designed to induce compliance with a directive of the National Board which, as the record shows, was issued on December 20, 1945 (R. 34), and petitioners could not consciously have suggested that they were. Petitioners did contend, that, as the record proves, as the Wisconsin Board and courts found, and as the employer knew, the stoppages were undertaken to induce compliance with their demands as embodied in the directive of the Regional War Labor Board, which had been issued on August 30, 1945 (R. 34), two months before the walk-outs began. This Court's finding that the employer did not know what demands the union was seeking to enforce, and did not know what concessions to make in order to bring an end to the stoppages, is thus based upon a misconception of the facts, a misconception which led this Court, inadvertently, we believe, to reverse the contrary findings of the state board and two state courts, and to substitute, for findings which the record supports, contrary findings which fly in the face of the evidence.

Apparently this Court did not take the Wisconsin Statute with the “gloss” of the Wisconsin Supreme Court opinion on it (*Hotel & Restaurant Employees, etc. v. Wisconsin Employment Relation Board*, 315 U. S. 437), but was misled into accepting the gloss which counsel for respondents placed upon the Statute, the Board Order, and the state decision. Respondents' counsel argued before the Circuit Court and the Wis-

consin Supreme Court that the Order of the Board could be justified by an alleged failure of the union to make any specific demands. They in effect argued that the Board's Order was sustainable on such alternative ground, although the Wisconsin Board obviously had not based the Order on such ground. However, neither court accepted this argument because of the conclusiveness of the record on this point, as illustrated by the testimony itself, the Findings of Fact of the Wisconsin Employment Relations Board, and the Memorandum Opinion of that Board accompanying those Findings.

There is not the slightest indication in either the Wisconsin Board's decision, Circuit Court decision, or in the Wisconsin Supreme Court decision that the decisions of the state were in any way based upon this alleged failure of demands.

Petitioners respectfully submit that the decision of this court should be based upon the Statute as construed and interpreted by the Wisconsin Supreme Court, and that any alleged alternative grounds, unsupported by the record, and which were not in fact the basis of the decision, may not properly be considered by this court in affirming that decision.

The fact is that the Wisconsin Supreme Court, in the view it took of the Statute, determined that it had only two questions to resolve. It first had to determine whether or not the activities of the union were concerted efforts to interfere with production. They obviously were. It next had to determine whether they came within the statutory exception, that is, whether they were strikes. It held that these activities were not strikes, as the State defines them. It, therefore, concluded that the Statute had been violated. That is all that the Wisconsin Court decided.

It confined its consideration to that part of Section 111.06 (2) (h) which makes "interference with production" unlawful, except in the case of a state-defined

strike. It did not consider that part of the statute relating to the taking of unauthorized possession of property (R. 110). Neither the frequency of the activities, the times at which they occurred, nor their duration were considered by the court, except insofar as it felt that those were not characteristics of a state-defined strike. Throughout its opinion, the Wisconsin Court emphasizes that the unlawfulness of the activities was found in their purpose, rather than in their method (R. 114, 116, 120). The Wisconsin Board had done likewise (R. 17, 21).

The issue, therefore, as framed by the Record, and as framed by the opinion of the Wisconsin Supreme Court, is whether the State of Wisconsin may restrain peaceful, concerted activities directed to the attainment of known legitimate collective bargaining demands, even though there is a resulting interference with production, solely because those activities do not meet the state definition of the term strike.

Inasmuch as this Court referred to the "unstated ends" with such frequency and with such emphasis so as to conclusively demonstrate that the decision of this court turned upon that point, and inasmuch as the record does not sustain the finding of this court that the activities were for "unstated ends", and since the Wisconsin Court did not base its decision upon that point, it is respectfully submitted that the Court reconsider its decision because of its misconception of the facts and the issue.

II

The Unwarranted Rejection of the Findings of the Wisconsin Board and Courts Led This Court to Overlook the Undisputed Fact That the National Labor Relations Board and the Federal Courts Hold Temporary Work Stoppages for the Objective Here Involved to Be Protected by Section 7 of the National Act.

This Court's finding (slip op. p. 18), that the stoppages were undertaken to win "unstated ends" rather

than to achieve specific demands apparently led the Court to misconceive the issue deemed crucial by both the National Board and the federal courts in deciding whether particular temporary work stoppages are or are not protected by Section 7 of the National Act; and to reject as inapplicable the uniform, unreversed holdings of the National Board that unannounced temporary work stoppages are protected by Section 7 provided that the stoppages are not an end in themselves, but a means to an end protected by Section 7.

The opinion of this court, relying primarily upon the *Conn* and *Home Beneficial* cases, states (slip op. p. 10), that the United States Courts of Appeals "have denied comparable work stoppages the protection of that section". But these cases can be regarded as "comparable" only if it is assumed (contrary to the record herein) that the objective of the intermittent work stoppages in this case was the unilateral fixing by the employees of the hours of their employment, an objective which was achieved by the stoppages themselves. Such was found by the Courts to be the objective of the stoppages in the *Conn* and *Home Beneficial* cases, and the opinions in both cases show that the conduct there involved was held not protected precisely because the objective was unilaterally to fix the terms of employment, rather than to induce the employer to come to an agreement concerning terms of employment.

In the *Conn* case, where employees refused to obey the employer's orders to work overtime because they did not want to work overtime except for premium pay, the court pointed out that the employees did not stop work for the purpose of exerting economic pressure on the employer to change the overtime rules, but rather "sought and intended to continue work upon their own notion of the terms which should prevail" (108 F. 2d 390, 397). Their activity was held not protected by Section 7 because the Act does not confer upon an employee "the right to work on terms pre-

scribed solely by him;" the right to engage in concerted activity for purposes of "Collective bargaining," obviously does not include the right of employees unilaterally "to fix the hours (or other terms) of their employment" (108 F. 2d, at p. 397).

Similarly, in the *Home Beneficial* case, the concerted activity which the court held not protected was the activity of insurance agents who, because of dissatisfaction with the employer's rule requiring agents to report to the office each morning before beginning work, undertook unilaterally to change this condition of their employment by simply refusing to report daily while otherwise performing their work. There, as in the *Conn* case, the objective of the activity was accomplished by the activity itself; there, as in the *Conn* case, the activity, both in purpose and effect, was unilateral alteration by employees of the conditions of their employment. And the opinion of the Court of Appeals for the fourth Circuit, in holding the activity not protected, quotes and relies upon the reasoning of the *Conn* case.

There are no decisions by Federal Circuit Courts of Appeals which hold or even suggest that one temporary walkout, or a series of temporary walkouts, by a majority of the employees in the bargaining unit, for the purpose of enforcing lawful demands in the course of collective bargaining are not within the scope of protection accorded concerted activities by Section 7 ⁽¹⁾. On the other hand there are unequivocal decisions of the Na-

1/ *Labor Board vs. Draper Corp.*, 145 F. 2d 199 (C. C. A. 4); *Labor Board vs. Indiana Desk Co.*, 149 F. 2d 987 (C. C. A. 7); and *Labor Board vs. Condenser Corp.*, 128 F. 2d 67 (C. C. A. 3), cited in this Court's opinion (slip op. p. 10) do not look to the contrary. In the *Draper* case a minority group struck to usurp the collective bargaining status of the certified representative, and the court regarded the object of their activity as interference with and antithetical to the collective bargaining envisioned by Section 7, and hence not within the protection of that Section. In the *Indiana Desk* case the object of the strike was to compel the employer to grant an illegal wage increase; the court holding that the "concerted activities for purposes of collective bargaining" which are protected by Section 7 do not include activities which aim at objectives which cannot lawfully be achieved in collective bargaining. It is significant that in this case two groups of employees walked out during working hours without warning to the employer, and without communicating to the employer any de-

tional Labor Relations Board, which have never even been subject to challenge in the federal courts, and have uniformly been deemed authoritative, holding that one or more temporary work stoppages, undertaken for the purpose of bringing economic pressure to bear upon an employer to induce him to comply with lawful demands are concerted activities protected by Section 7 of the Act.

In *Matter of Harnischfeger Corp.*, 9 N.L.R.B. 676, 685, for the purpose of inducing the employer to accede to their demand for a signed collective agreement, the employees, acting in concert, repeatedly refused to work overtime. The Board held that the refusal to work overtime "was, in effect, a partial strike" (9 N.L.R.B., at 686); that this concerted activity was protected by Section 7 of the Act despite the fact that the employer was not notified that such activity would be undertaken to induce him to sign an agreement (9 N.L.R.B., at p. 685); and that the protection afforded by Section 7 to concerted activities was not forfeited merely because the tactics used interrupted production and occasioned the employer "considerable difficulty" (*ibid.*). The Board expressly pointed out that "calling a strike would have occasioned the (employer) much more serious difficulty, and it cannot be contended that employees may properly be discharged for calling a strike" (*ibid.*).

In *Matter of Cudahy Packing Co.*, 29 N.L.R.B. 837, the employees, in an effort to induce the employer to revoke a scheduled change in working conditions, engaged in a series of work stoppages lasting 10 and 20

mands (149 F. 2d 987, 989). The opinion shows that the court did not regard these facts as in any way militating against the protection accorded to concerted activities by Section 7. In the *Condenser* case the court held unprotected a spontaneous cessation of work during the middle of the working day, the object of which was to compel the employer to meet with them to adjust grievances immediately rather than at the end of the working day, as the employer had promised. The opinion shows on its face that the court held the activity not protected because it regarded its objective as improper, not because it deemed any temporary cessation of work an inappropriate means for bringing economic pressure on the employer, but because "Employees cannot insist that their demands be met in the middle of a working day, when the employer has promised to deal with them as a group at the end of the day" (128 F. 2d 67, 77).

minutes each. The employer was not notified that stoppages would occur. The Board held that the union's program of planned stoppages, for the purpose of inducing the employer to comply with the union's lawful demand, was a form of concerted activity protected by Section 7 of the Act. The Board found that the stoppages were "a type of strike" and that there was "no warrant" for holding them not protected by the Act (29 N.L.R.B. 867-868).

These cases, as well as others cited in the Court's opinion (slip op. p. 9), make it perfectly clear that the Board has uniformly and repeatedly held that temporary work stoppages engaged in for the purpose of inducing an employer to accede to lawful demands concerning wages, hours and working conditions are protected by Section 7 of the Act; that stoppages are protected as much when the employees intend to return to work at a fixed time regardless of whether their demands are met, as when they intend to remain on strike until their demands are met or withdrawn; that the protection is not conditioned upon notification to the employer that stoppages will occur unless specific demands are met²; and that the statute's guarantee of the right to engage in such activity is not forfeited by repeated exercise of the right.

That the federal courts approve this view of the scope of protection accorded concerted activities by Section 7 is evident from the grounds upon which the Courts of Appeals predicated their decisions in the *Conn* and *Home Beneficial* cases. Nothing in those opinions suggest that temporary, recurrent work stoppages are *per se* unprotected by Section 7, or that work stoppages lose protection if employees do not stay away until their demands are met or abandoned; indeed, by emphasizing that the vice in those cases lay in the *objective*, i. e., unilateral establishment of conditions of employment,

2/ Cf. *N.L.R.B. vs. Kalamazoo Stationery Co.*, 180 F. 2d 465 (C. C. A. 6), certiorari denied, 332 U.S. 152.

the Courts indicated their agreement with the Board's view that when such stoppages are utilized to obtain objectives within the proper scope of collective bargaining, the stoppages are protected. And the Committees of Congress which, in 1947, after careful and painstaking study of the entire body of Board doctrine, reported their findings and recommendation for amendment of the National Act, nowhere indicated disapproval or disagreement with the interpretation of Section 7 adopted and applied by the Board in the *Harnischfeger*, *Cudahy*, and similar cases.

Of course these cases do not hold that "all work stoppages are federally protected concerted activities" (slip op. p. 9), or that "all concerted activities" are "protected" (slip op. p. 10). But this Court clearly erred in assuming that, because there was no such rule, it followed that the concerted activities in the instant case were not within the scope of protection established by "fixed Board interpretation" (slip op. pp. 9, 10).

III

The Court Erroneously Assumed That the National Board Does Not Protect the Right of Employees to Engage in Temporary Work Stoppages of the Kind Here Involved But Merely Shields Employees Who Engage in Them From Discharges Motivated by Anti-Union Animus.

As we read the Court's opinion (slip op. pp. 9-10), the Court appears to have assumed that the National Board in cases such as *Harnischfeger* and *Armour* was not concerned with the question whether the right to engage in the type of work stoppages there involved was guaranteed by Section 7, but decided only that an employer, motivated by anti-union animus, could not impose the heavy penalty of discharge upon employees who engaged in such activity. It is clear, however, we submit, even from the quoted excerpt of the Board's opinion in the *Harnischfeger* case (slip op. pp. 9-10), that the

Board regards Section 7 as conferring upon employees *the right* to engage in certain types of concerted activities for purposes of collective bargaining. The question dealt with in the *Harnischfeger* and similar cases was whether temporary work stoppages to achieve objectives in the area of collective bargaining were among the type of activities to which the guarantees of Section 7 extend. The Board's statement that the activities involved in that case were not "indefensible" expressed the Board's conclusion that the rights conferred in Section 7 comprehend the right to engage in these activities, not merely that an employer motivated by anti-union animus could not penalize participation in such activity by discharge.

That an employer is prohibited from interfering with concerted activities which are protected by Section 7 by any method, including the establishment of plant rules, or the imposition of any discipline, including discharge, and that the discharge of an employee for engaging in such activity is *ipso facto* violative of Section 8 (3) regardless of the employer's motive, is apparent not only from the uniform holdings of the Board and all of the federal courts including this Court, but from the terms of the Act itself. Section 8 (1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." Clearly the discharge of an employee for engaging in any activity which marks the exercise of a right guaranteed by Section 7, thereby interferes with, restrains and coerces employees in violation of Section 8 (1). Such a discharge, as this Court held in *National Labor Relations Board vs. Republic Aviation Corp.*, 324 U.S. 793, 805, is necessarily discrimination prohibited by Section 8 (3) of the Act, regardless of the absence of anti-union animus, since "it discourages membership in a labor organization." In the *American Manufacturing* case, 7 N.L.R.B. 753, 759-760 (enforced by the Court of Appeals for the Fifth Circuit by consent of the parties, subsequent contempt proceedings reported 132 F. 2d 750 (C. C. A. 5), certiorari denied, 319 U.S. 743), the Board

held that the action of the employer in promulgating a plant rule prohibiting employees from engaging in temporary work stoppages and threatening to discharge employees who did, violated Section 8 (1) of the Act because "the purpose and effect" of the employer's action was "to restrain them from engaging in concerted activities for their mutual aid and protection."

It is therefore apparent that the Board decisions which hold that an employer may not discharge employees for participating in concerted activities which are protected by Section 7, rest upon the premise that Congress has conferred upon employees the right to engage in such activity and that any employer action, including discharge, which tends to restrain the exercise of that right is, for that reason alone, violative of Section 8 of the Act.

IV.

The Court's Opinion Rests on the Erroneous Premise That Because the Act Does Not Protect, Against State Interference, All Activities in Aid of Collective Bargaining Merely Because They Are Concerted, the Activities Here Involved Are not Within the Area Affirmatively Guaranteed.

The Court in its opinion regards as "elementary" the proposition that "what Congress constitutionally has given, the state may not constitutionally take away" (slip op. p. 8). Nor does the Court purport to depart from the rule enunciated in the *Allen-Bradley* case, 315 U.S. 740, 750, and applied in *Hill vs. Florida*, 325 U.S. 538, that any state action which "impairs, dilutes, qualifies or in any respect subtracts from any of the rights guaranteed and protected by the Federal Act" cannot Constitutionally stand. Nevertheless, the effect of the Court's opinion is directly in conflict with these principles since it permits the states not only to whittle away, but to destroy completely the federally guaranteed right

to engage in concerted activities for purposes of collective bargaining.

The Wagner Act's guarantee of the right "to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection" appears in Section 7 as part of the same sentence which guarantees to employees the right "to bargain collectively through representatives of their own choosing." Congress conferred both guarantees alike by the single introductory phrase "Employees shall have the right." It cannot even be suggested, we submit, that while both rights were conferred upon employees in a single breath, one right is immunized against state interference, as *Hill vs. Florida* holds, but the other is not immune.

It was no accident that Congress conjoined in Section 7 the right to engage in concerted activities for purposes of collective bargaining with the right to self organization and the right to bargain collectively through freely chosen representatives. Protection of the right to engage in concerted activities for purposes of collective bargaining represented the deliberate judgment of Congress that the objective of the statute to increase the bargaining power of employees *vis-a-vis* the employer, thereby enabling them to obtain better wages, hours and working conditions, required full protection of the right of employees, acting in concert, to interrupt production by stopping work. Congress determined that employees must be free to impose such economic injury upon employers because only thereby could they have even a chance of obtaining improved wages or working conditions from recalcitrant employers. Unless employees were free to support their lawful demands by concerted work stoppages which interfered with production, equality of bargaining power would be a myth, and the evils which Congress sought to eliminate by the statute would continue to fester and poison the national economy. Congress conferred upon employees the right to engage in concerted activities because it determined that in the

interests of national policy the need of employees for effective means of bringing economic pressure to bear upon employers in support of lawful economic demands should supersede the desire of employers to maintain uninterrupted production.

These facts have repeatedly been recognized by decisions of this Court, other federal courts, and by the National Labor Relations Board. In *Allen-Bradley Co. vs. Local Union 3*, 325 U.S. 797, 805, this Court noted that one of the major purposes of Congress in enacting the National Labor Relations Act, as the Norris-La-Guardia Act, was to accord affirmative protection to the right to engage in concerted activities for the purpose of collective bargaining, activities which warranted federal protection because of their "public importance under modern economic conditions." And, as we have shown above, the National Labor Relations Board and the federal Courts of Appeal have uniformly taken the view that work stoppages for the purpose of enforcing lawful collective bargaining demands cannot possibly be deemed removed from the area of protection accorded by the Act merely because they are termed "unwarranted interference with production" (*Matter of Armour and Company*, 25 N.L.R.B. 989, 996), or because the activity causes an employer "considerable difficulty" in scheduling production (*Matter of Harnischfeger Corp.*, 9 N.L.R.B. 676, 686).

It follows that if the employer had discharged employees who engaged in the concerted activities here involved for the reason that the activities "interfered with production", the National Labor Relations Board would have found the discharges violative of the federal Act because they restrained the exercise of rights therein guaranteed the employees. Unless, then, the states are empowered to narrow the scope of protection accorded to concerted activities by Congress, thereby precluding the National Board from protecting activities such as these against interference by employers, the action of

Wisconsin in enjoining the activities must be deemed in conflict with federal law. For, as the late Mr. Chief Justice Stone pointed out in his concurring opinion in *Hill vs. Florida*, 325 U. S. 538, 545:

"The fact that the National Labor Relations Act imposes sanctions on the employer alone does not mean that it did not by Section 7, confer the right on employees as against others as well as the employer * * *. Section 7 confers the right * * * generally on employees and not merely as against the employer."

Certainly, as the *Hill* case holds, an injunction restraining the exercise of a right guaranteed by Section 7 is as much forbidden interference with that right as any sanctions which an employer might impose.

This Court holds, however (slip op. pp. 10-11), that its own prior decisions in the *Fansteel*, *Southern Steamship*, *Sands* and *Allen-Bradley* cases require the view that the states are free to narrow the scope of federally protected concerted activities as Wisconsin has here attempted to narrow it. We believe not only that the cases cannot fairly be so construed, but that to so apply them is to make a mockery of federal policy in this field.

It is true, of course, as the *Allen-Bradley* case, 315 U.S. 740, holds, that Section 7 does not draw from the State's power to enjoin or to punish conduct which, though it occurs in the course of concerted activities for purposes of collective bargaining, the state has, on independent grounds in the exercise of its police power, made unlawful. The states may legalize tortious seizure of another's property, fraud, violence, and the like, and may apply such laws to employees as well as all other persons within their jurisdiction. And when employees, in the course of concerted activities for purposes of collective bargaining engage in conduct which, if done by them or others on any other occasion would run afoul of state law, Section 7 neither immunizes their conduct from employer sanctions designed to bring it to

an end nor does it impede the remedial powers of the states. The decisions of this Court cited on pp. 10-11 of the opinion hold no more than this.³ They do hold, as this Court notes on p. 11 of the opinion, that "otherwise illegal action", action which would be illegal if undertaken by one employee alone, is not immunized by Section 7 merely because it is done by many employees acting together in aid of collective bargaining. But they do not hold, and without completely destroying federal protection of the right, they cannot be deemed to hold, that a state may, consistently with Section 7, illegalize any concerted temporary work stoppage in aid of collective bargaining merely because such concerted action "interrupts production" and thereby imposes economic injury on the employer. If a state could, consistently with Section 7, regard consequential economic injury to the employer as sufficient grounds for illegalizing any temporary work stoppage in aid of collective bargaining (the sole ground for the state action in this case), it could illegalize all work stoppages. For, as the National Board pointed out in the *Harnischfeger* case, *supra*, as the Circuit Court pointed out in this case (R. 7-8), and as the record shows (R. 43), the only difference between temporary stoppages such as those which occurred in the instant case and long term strikes is that the former disrupt production less, and occasion smaller economic detriment to the employer than the latter. If Section 7 does not bar a state from attempting to shield the economic interests of employers in uninterrupted production by enjoining temporary stoppages such as these, then *a fortiori* it does not bar the state from protecting employers against all economic pressure exerted in concert by employees by enjoining all strikes.

We cannot believe that this Court intended so to hold. Indeed, the opinion concedes to Section 7 the role of im-

³ *The Southern Steamship* case, of course, is an instance of conduct made illegal by another federal law, which, for this reason, is not protected by Section 7 despite the fact that it is concerted and in aid of collective bargaining.

munizing "otherwise lawful activities to aid unionization" from the reach of state attempts to illegalize them "merely because they are undertaken by many persons acting in concert" (slip op. p. 11). But while the Court says that Section 7 means that "legal conduct may not be made illegal by concert", its opinion fails to recognize that this is precisely what Wisconsin in this case has done.

Section 111.06 (2) (h), of the Wisconsin Act, on its face, and as construed by the Wisconsin Board and courts, makes it unlawful for employees "to engage in any *concerted* effort to interfere with production except by leaving the premises in an orderly manner for the purpose of going on strike" (slip op. pp. 1, 4; R. 113). Perfectly clearly, Wisconsin does not deem it unlawful for an employee to engage in an *individual*, not *concerted*, effort to interfere with production by leaving work temporarily. What Wisconsin has done is to make it unlawful for employees to do in concert what each may lawfully do individually. This is nothing more nor less than the application of the "conspiracy weapon" which this Court in its opinion (slip op. p. 11), holds that Section 7 took away from the employer and the state. The very language of this Court's opinion thus requires a contrary judgment.

But Wisconsin has done more in this case than apply the conspiracy doctrine to illegalize otherwise lawful activities, in the teeth of Section 7. Wisconsin has made these concerted activities illegal for the sole reason that their objective is "to interfere with production." The Supreme Court of Wisconsin held these activities unlawful solely because this was their "objective", and because that court found that the Wisconsin Act made this objective "unlawful" (R. 116, 120). What Wisconsin has done, therefore, is to substitute its own judgment for the contrary judgment of Congress that, with respect to temporary work stoppages, the interests of the employer in uninterrupted production outweigh the inter-

ests of the employees in effectively supporting their legitimate economic demands. Wisconsin can no more be permitted to do that without nullifying federal supremacy than could Florida, in the *Hill* case, be permitted to substitute for the judgment of Congress that employees should be totally unrestrained in their choice of bargaining agents, the state's notion that the employees' choice should be limited to those agents who complied with the requirements of state law.

V.

The Court Erred in Holding That Under the Federal Act the Federal Board Has No Authority Either to Investigate or Approve the Union Conduct in Question.

This court, in rejecting Petitioners' argument that the activities herein involved were protected under the National Act and within the exclusive jurisdiction of the National Labor Relations Board, based such rejection upon its conclusion that the National Labor Relations Board did not have the authority either to investigate or approve the union conduct in question, and that, therefore, such conduct was subject to state control. Petitioners submit that in so holding this Court has overlooked the fact that the National Labor Relations Board, in all cases involving alleged discriminatory discharge, is under the duty to consider and must make investigation of the nature of the activities for which the discharge was made. Almost the entire body of law, growing out of the enactment of the National Labor Relations Act, concerns itself with whether or not certain types of activities engaged in by employees, whether acting singly or in concert, are protected under Sections 7 and 13 of the Act. Where the finding is that such activities are protected, the Board directs reinstatement with back pay. Where the finding is that such activities are not protected, the Board dismisses the case. In the instant case, therefore, the National Board did have the authority to determine whether or not the activities engaged in by the union were protected activities. The matter

would properly have come before the Board in the event of a discharge of any of the Petitioners herein. Yet the court seems to commend the employer for its failure to make a discharge in order to determine whether or not the activities are protected activities, and for taking what this court apparently considers to be the less drastic step of invoking the injunctive processes of the state to restrain virtually all employees within the bargaining unit from engaging in their right to stop work for the purpose of attaining collective bargaining demands. It sounds rather strange today to hear the United States Supreme Court speak of a labor injunction as being a less drastic step than the discharge of an individual employee or union officer, who, in such event, may look to the National Labor Relations Board for protection, if he is entitled to it.

That the employer here chose to place the issue before a state agency under a state law should not weigh the balance in the employer's favor, where we are dealing with federal legislation and federally protected rights. What the court has here approved is the complete circumvention of the agencies set up by the federal government for the purpose of protecting the rights of employees and has permitted the long and tedious process of litigation before a state board, a state intermediate appellate court, a state final appellate court, and the United States Supreme Court for the purpose of ascertaining the broad reaches of Section 7. In this manner the administrative agency, in whom the Congress has placed the original and primary duty to ascertain what are protected rights under Section 7, has been completely ignored, and this court is required to conjecture over what the policy of the National Board would be in dealing with this type of situation. Reason enough, we believe, to find that Congress has pre-empted the field.

This court has also overlooked the fact that the sole basis of the employer's complaint is the fact that the employees had not gone out on a conventional, full-time

strike. Yet the employer could very easily have created that very situation by closing its plant until such time as the dispute over the new contract was settled. This it had a right to do, without running afoul of the National Law. So, although the burden placed upon the employer resulting from the exercise of concerted activities guaranteed under Section 7 never has been a basis for testing what those rights are, the court has, in effect, said that since the employer did not discharge any of the leaders of the union, and since the employer did not avail itself of the right to close down the plant until the dispute was settled, the employer is entitled to the protection of an injunction issued by the state because the particular type of stoppages herein involved were effective. Employees and their unions are told by this Court that they are free to engage in concerted activities, unless those activities are demonstrably effective, at which point, and for that reason, the state may step in and restrain such activities. The Wagner Act thus goes the way of the Clayton Act.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Rehearing should be granted, and that the judgment of the Supreme Court of Wisconsin should be reversed.

Respectfully submitted,

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This Petition for Rehearing is presented in
good faith and not for delay.

IN THE
Supreme Court of the United States
October Term, 1948

Nos. 14 and 15

**INTERNATIONAL UNION, UNITED AUTOMOBILE WORK-
ERS OF AMERICA, A. F. of L., LOCAL 232; ANTHONY
DORIA, CLIFFORD MATCHEY, WALTER BERGER,
ERWIN FLEISCHER, JOHN M. CORBETT, OLIVER
DOSTABLER, CLARENCE EHLMANN, HERBERT
JACOBSEN, LOUIS LASS,**

Petitioners,

vs.

**WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E.
GOODING, HENRY RULE and J. E. FITZGIBBON, as
Members of the Wisconsin Employment Relations Board;
and BRIGGS & STRATTON CORPORATION, a Corpora-
tion,**

Respondents.

**BRIEF FOR THE CONGRESS OF INDUSTRIAL ORGANI-
ZATIONS AS AMICUS CURIAE IN SUPPORT OF
PETITION FOR REHEARING**

ARTHUR J. GOLDBERG
General Counsel

THOMAS E. HARRIS
Assistant General Counsel

INDEX

Interest of the Congress of Industrial Organizations	1
Argument	2

TABLE OF AUTHORITIES CITED

E. C. Brown Co., 81 N.L.R.B. 22, 23 LRRM 1307	6
Labor Board v. Fansteel Corp., 306 U.S. 240	6
National Maritime Union, 79 N.L.R.B. 971, 22 LRRM 1289, 1296-7	5
Pepsi Cola Bottling Co. of Montgomery, 72 N.L.R.B. 601	6
Wholesale and Warehouse Workers Union, Local 65, No. 2-C.B. 109 (decided March 11, 1949)	6

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BRIEF FOR THE CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF PETITION FOR REHEARING

The Congress of Industrial Organizations submits this brief as *amicus curiae* pursuant to Rule 27 of this Court. The written consent of all parties to the case to the filing of this brief has been filed with the Clerk.

INTEREST OF THE CONGRESS OF INDUSTRIAL ORGANIZATIONS

The Congress of Industrial Organizations is filing this brief because it considers that the recent decision of this Court in this case will seriously harm the labor movement, because it (1) imperils the right to strike, by opening the way for state legislatures, courts, and commissions to prohibit strikes—or

work stoppages—even in industries which are in or affect interstate commerce; and (2) creates widespread uncertainty as to the permissible scope of state regulation of labor relations.

We will also endeavor to demonstrate, in support of the petition for rehearing, that the decision of this Court is based upon a complete misapprehension as to the scope and operation of the National Labor Relations Act.

ARGUMENT

I.

The decision of this Court that, notwithstanding the provisions of the National Labor Relations Act, the states may, in certain undefined circumstances, prohibit strikes or work stoppages, even in plants which are in or affect interstate commerce, threatens the destruction of rights of the greatest importance to the labor movement. It is not too much to say that the right to strike is the most important of all rights of workers and of labor unions. It is, by and large, only through the exercise of that right—or the threat to exercise it—that workers can secure or maintain decent wages, hours, and working conditions.

It has always been the understanding of the labor organizations in this country that the right to strike, or concertedly to stop work, was protected against interference, whether by the states or by private employers, by Section 7 of the National Labor Relations Act. Now this Court has opened the door to state restriction of that right. To do that is virtually to destroy the right to strike, throughout broad regions of the country. The lengths to which underdeveloped areas will go in adopting repressive labor legislation for the purpose of attracting out of state industry are matters of common knowledge. To meet this threat to a unified and prosperous national economy a National Labor Relations Act is as necessary as a national wage hour act or public contracts act. To deprive the right of national protection is to destroy it. Since it is a right which is vital to the labor movement that is at stake, we respectfully request that the Court grant reargument in this case.

II.

The decision leaves in complete confusion the question of the permissible scope of state regulation of labor relations. We submit, with all deference, that no one can ascertain, from reading the Court's opinion whether it holds—

(1) That Sections 7 and 13 of the National Labor Relations Act are inapplicable because, although the conduct prohibited by the state board constituted concerted employee activity, it was not a "strike," or

(2) That the states may regulate or prohibit strikes, or other concerted employee activities, which this Court agrees are for some reason improper, or

(3) That the states may prohibit strikes (or other concerted activities) because of their "tactics," but not because of their "objectives," or

(4) That, under Section 7 of the national Act, the states may prohibit any activity so long as they do not make it illegal merely because it is undertaken by workers acting in concert.

It is too manifest to need stressing that industrial peace will not be promoted by such utter chaos as to the permissibility of state regulation of labor disputes.

Moreover, of the possible alternative interpretations of the opinion outlined above, it is that numbered (4) which is most strongly supported by the language of the opinion. And that construction would lead to a result opposite to that reached by the Court.

Thus the opinion of the Court declares that the purpose of Section 7 was not to guarantee to employees the right to strike, or to engage in other concerted activities, but simply to outlaw "the doctrine that concerted activities were conspiracies" and therefore illegal. The opinion declares:

No longer can any state, as to relations within reach of the Act, treat otherwise lawful activities to aid unionization as an illegal conspiracy merely because they are undertaken by many persons acting in concert.

But even under this highly restrictive construction of Section 7, the order of the Wisconsin Board could not stand. The

Wisconsin board ordered the union to cease and desist from engaging in "concerted efforts" to interfere with production by inducing work stoppages during working hours, or engaging in any other "concerted effort" to interfere with production, etc. And, according to the opinion of this Court, the Supreme Court of Wisconsin "significantly limited" the effect of the board's order by holding that

what the order does, and all that it does, is to forbid individual defendants and members of the union from engaging in concerted effort to interfere with production by doing the acts instantly involved.

Thus, action in *concert* is exactly what is forbidden and is all that is forbidden. Workers are not forbidden to stop work individually and intermittently, even if they do so for the purpose of interfering with production. Conduct is forbidden if undertaken in concert which would be legal if undertaken individually. That is just what, this Court says, Section 7 was meant to prevent the states from doing.

III.

We submit that the Labor Management Relations Act, 1947, occupies the field of determining whether strikes or work stoppages in or affecting interstate commerce are legal or illegal, to the complete exclusion of state determination of that issue. This is entirely apart from the question whether Sections 7 and 13 of that Act explicitly bar state restriction of strikes or work stoppages.

This Court's conclusion that the national Act does not occupy the field is based upon a complete misapprehension as to the scope and operation of that Act. The Court's decision in this regard is based on its assertion that the national Act—

gives the Federal Board no authority to prohibit or to supervise the activity which the State Board has here stopped nor to entertain any proceeding concerning it, because it is the objectives only and not the tactics of a strike which bring it within the power of the Federal Board.

This assertion is wrong, and is easily demonstrated to be wrong, in virtually every particular.

1. The national Act plainly *does* give the federal Board authority to entertain a proceeding concerning the very activity which the state Board stopped, and it very probably authorizes the federal Board "to prohibit or to supervise" the activity in question.

That activity, according to the opinion of this Court, was the inducing of intermittent work stoppages over a period of five months:

The employer was not informed during this period of any specific demands which these tactics were designed to enforce nor what concessions it could make to avoid them.

Section 8(b)(3) of the national Act makes it an unfair labor practice for a labor organization or its agents "to refuse to bargain collectively with an employer." Section 8(d) provides that:

to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder. * * *

It is thus too plain for argument that it was within the jurisdiction of the National Board to determine whether the conduct described in the Court's opinion constituted a refusal to bargain. And it is rather clear that the conduct described did constitute a refusal to bargain. That conclusion would seem to follow from the language and policy of the statutory provision. Moreover, the National Board has declared that whether a union has engaged in a refusal to bargain will be determined by the same tests which have long applied to employers under the Wagner Act. *National Maritime Union*, 79 N.L.R.B. 971, 22 LRRM 1289, 1296-7. And it is settled that a lockout or shut-down—the employer analogue of a strike or work stoppage—for the purpose of putting pressure

on a union constitutes a refusal to bargain. See e.g., *E. C. Brown Co.*, 81 N.L.R.B. 22, 23 LRRM 1307; *Pepsi Cola Bottling Co. of Montgomery*, 72 N.L.R.B. 601.

Thus this Court seems clearly to have been laboring under a misapprehension as to what the federal Act provides when it states that—

We think that this recurrent or intermittent unannounced stoppage of work to win unstated ends was neither forbidden by Federal statute nor was it legalized and approved thereby.

In all probability the federal Board would hold that union conduct like that described by the Court constitutes a refusal to bargain. And even if it would conclude otherwise in a particular case, it is perfectly clear that the national Act and the national Board have occupied the entire field.

2. This Court's statement that "it is the objectives only and not the tactics of a strike which bring it within the power of the Federal Board" is likewise entirely erroneous.

A refusal to bargain is a matter of tactics rather than objectives, and such a refusal brings a strike within the jurisdiction of the federal Board.

Again, Section 8(b)(1) makes it an unfair labor practice for a union "to restrain or coerce" employees in the exercise of the rights guaranteed in Section 7. Restraint or coercion are matters of tactics, not objectives. They may constitute "the tactics of a strike which bring it within the power of the Federal Board." The Labor Board has so held very recently. *Wholesale and Warehouse Workers Union, Local 65*, No. 2-C.B. 109 (decided March 11, 1949).

The distinction between "objectives" as a matter for the federal Board and "tactics" as a matter for the state Board thus does not at all stand scrutiny. Even under the Wagner Act the federal Board was concerned with "tactics," because they might lead to the withholding of relief otherwise granted to employees or unions. *Labor Board v. Fansteel Corp.*, 306 U.S. 240. Under the Taft-Hartley Act the federal Board is directly concerned with union "tactics" because they may constitute unfair labor practices—and the very tactics which

7
the Wisconsin Board prohibited would probably be an unfair labor practice under the federal Act.

Since the Court's conclusion that the federal Act does not occupy the field is clearly based upon misconceptions as to the provisions and scope of the federal Act, we submit that reargument should be granted in this case.

IV.

While the matter should be fully considered on reargument, we submit the following tentative analysis as to what we believe to be the proper fields of federal and state power over strikes or work stoppages affecting interstate commerce:

1. The determination of the legality or permissibility of a strike or work stoppage is solely a matter for the federal government: i.e., normally for the federal Board, but in the case of so-called national emergency strikes for the federal executive and judiciary. This federal jurisdiction is complete and exclusive, whether the determination of legality is made upon the basis of objectives, tactics, or, as in the case of national emergency strikes, effect. The Labor Management Relations Act, 1947, has fully occupied the field.

2. The states have jurisdiction to punish or enjoin breaches of the peace. This state power is not excluded by the Commerce Clause, standing alone, and federal legislation has not occupied the field to the exclusion of state power. But this state power does not extend to prohibiting strikes or work stoppages, even when breaches of the peace occur in connection with them, but only to punishing or preventing the breaches.

CONCLUSION

For the reasons stated, it is respectfully requested that the petition for rehearing be granted.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1948

Nos. 14 and 15

INTERNATIONAL UNION, UNITED AUTOMOBILE
WORKERS OF AMERICA, A. F. of L., LOCAL
232; ANTHONY DORIA, CLIFFORD MATCHEY,
WALTER BERGER, ERWIN FLEISCHER, JOHN
M. CORBETT, OLIVER DGSTALER, CLARENCE
EHRMANN, HERBERT JACOBSEN, LOUIS
LASS,

Petitioners,

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD,
L. E. GOODING, HENRY RULE and J. E. FITZ-
GIBBON, as Members of the Wisconsin Employ-
ment Relations Board; and BRIGGS & STRATTON
CORPORATION, a Corporation,

Respondents.

**Brief of Wisconsin Employment Relations
Board In Opposition To Petition
For Rehearing**

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INDEX

PAGE

- I. THE OPINION OF THE COURT IS CONSONANT WITH THE FINDINGS OF THE WISCONSIN BOARD AND THE STATEMENTS OF THE WISCONSIN COURT RESPECTING THE OBJECTIVE OF THE PETITIONERS' COERCIVE PROGRAM. THE ABSENCE OF DEFINITELY ASCERTAINABLE OBJECTIVES WAS MERELY ONE OF THE INCIDENTAL ASPECTS OF THE PROGRAM AND NOT THE SOLE CONSIDERATION OF THE DECISION 2
- II. FEDERAL COURTS HAVE HELD COERCIVE ACTIVITIES SIMILAR TO THOSE HERE INVOLVED TO BE CONTRARY TO THE SPIRIT OF THE FEDERAL LAW; AND THE NATIONAL LABOR RELATIONS BOARD HAS NEVER HELD SUCH A PROGRAM AS IS HERE INVOLVED TO BE PROTECTED BY SUCH LAW 5
- III. PETITIONERS HAVE FAILED TO GRASP THE COURT'S ANALYSIS OF THE NATIONAL BOARD'S ORDERS PROHIBITING DISCIPLINARY ACTION BY EMPLOYERS IN CERTAIN CASES 8
- IV. THE TYPE OF COERCIVE ACTION INVOLVED IN THIS CASE IS NOT GUARANTEED BY FEDERAL LEGISLATION AGAINST EMPLOYER INTERFERENCE OR OTHERWISE 9
- V. THE COURT DID NOT ERR IN HOLDING THAT THE NATIONAL BOARD MAY NOT APPROVE A PRACTICE WHICH THE COURTS HAVE HELD CONGRESS DID NOT INTEND TO PROTECT 11

VI. THIS COURT DEFINED THE AREA FOR STATE ACTION IN THE MANNER BEST CONCEIVED TO CARRY OUT THE WILL OF CONGRESS AND TO PROMOTE THE PUBLIC WELFARE	13
---	----

CASES CITED

Case, J. I., Co. v. National Labor Relations Board, (1944) 321 U. S. 332, 88 L. ed. 762, 64 S. Ct. 576	6
Conn, C. G., Limited v. National Labor Relations Board, (1939) 108 F. 2d 390	5, 6, 8
Hill v. State of Florida, (1945) 325 U. S. 538, 65 S. Ct. 1373, 89 L. ed. 1782	10
Home Beneficial Life Ins. Co. v. National Labor Rel. Bd., (1947) 158 F. 2d 280	5, 6-7
Matter of the Cudahy Packing Co., 29 N. L. R. B. 37	7
National Labor Relations Bd. v. Jones & Laughlin S. Corp., (1937) 301 U. S.-1, 81 L. ed. 893, 57 S. Ct. 615	14
National Labor Relations Board v. Kalamazoo Station- ery Company, (1947) 160 F. 2d 465 (C. C. A. 6)	7
National Labor Relations Bd. v. Montgomery Ward & Co., (1946) 157 F. 2d 486	5, 6, 7

STATUTES INVOLVED

Wisconsin Statutes 1947

PAGE

Sec. 111.06 (2) (b) 3

111.15 17

TEXTS

Restatement, Law of Torts, sec. 794 3

1 Teller, Labor Disputes and Collective Bargaining,
sec. 86 7

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I.

THE OPINION OF THE COURT IS CONSONANT WITH THE FINDINGS OF THE WISCONSIN BOARD AND THE STATEMENTS OF THE WISCONSIN COURT RESPECTING THE OBJECTIVE OF THE PETITIONERS' COERCIVE PROGRAM. THE ABSENCE OF DEFINITELY ASCERTAINABLE OBJECTIVES WAS MERELY ONE OF THE INCIDENTAL ASPECTS OF THE PROGRAM AND NOT THE SOLE CONSIDERATION OF THE DECISION (In reply to pp. 1 to 6 of Petition for Rehearing)

It is with some reluctance that we enter upon a discussion of the petitioners' challenge to the court's statement that the employer "was not informed * * * of any specific demands which these tactics were designed to enforce nor what concessions it could make to avoid them"—but that reluctance does not result from the smallest doubt of the accuracy of the court's summation. It stems rather from a preference not to give to a passing consideration the emphasis accorded to a major issue. The statement was included as one of a number of incidents descriptive of the procedure and has the same status as other descriptive items such as the circumstance that the stratagem was "without warning to the employer or notice as to when or whether the employees would return," that it "was repeated on 26 occasions," and that it consisted of "calling repeated special meetings of the union." Each portion of the descriptive material is correct in isolation, but perhaps no one item would in itself be decisive of the case.

The absence of specific demands was discussed in the respondent board's brief because it was that circumstance

which made impossible an evaluation of the conduct on the basis of its objective and made necessary an analysis of the tactics on other grounds. It is a tenet of the common law that concerted coercive action is indefensible (as well as being an unfair practice under sec. 111.06 (2) (b), Wisconsin Statutes) when it has an improper or unlawful objective. See for instance, Restatement Law of Torts, sec. 794 et seq. Had the objective of the action here involved been sufficiently definite so as to make possible an evaluation of its legality the case might have ended there, because it is generally recognized that *any* coercive action, regardless of whether otherwise proper, is indefensible if undertaken in support of a wrongful objective.

The state board found that the stratagem was adopted to enforce demands of the petitioners, and no one connected with the case is so naive as to argue otherwise. The significant thing about the board's findings in that respect is its omission to specify *what* demands were to be so enforced. Surely the nature of the demand would have been discussed if it could have been ascertained because of the laws seeking to prevent coercion for improper objectives.

Words similar to those of the United States Supreme Court were used by the Wisconsin Supreme Court when the latter said "No demand was made upon the company that any or a succession of walkouts would be engaged in unless the company conceded to the terms of the new contract as proposed by the union" (R. 107):

For the first time in the petition for rehearing, it is suggested that the employer was aware it could avoid the stoppages by compliance with a directive of a Regional War Labor Board. There is no evidence in the record to that

effect; and such a result can surely not be reached by implication when the petitioners had themselves appealed from a directive of the Regional Board on September 11, 1945, prior to the commencement of the coercive program here under discussion (R. 34).

In the light of the unchallenged evidence that many varying and inconsistent reasons were given to the employer for the petitioners' conduct (R. 36, 37, 39, 48, 49), that new demands were being made (R. 35), and that the petitioners disavowed even at the hearing that the purpose of the program included certain demands previously made upon the employer and pressed before the War Labor Board (R. 48), we submit that the statement of this court to which the petitioners object is not only warranted but unavoidable.

The exact objectives of the petitioners were not only uncommunicated to the company but had indeed not been finally settled upon by themselves.

II.

FEDERAL COURTS HAVE HELD COERCIVE ACTIVITIES SIMILAR TO THOSE HERE INVOLVED TO BE CONTRARY TO THE SPIRIT OF THE FEDERAL LAW; AND THE NATIONAL LABOR RELATIONS BOARD HAS NEVER HELD SUCH A PROGRAM AS IS HERE INVOLVED TO BE PROTECTED BY SUCH LAW (In reply to pp. 6 to 11 of Petition for Rehearing)

The petitioners urge a distinction between this case and cases such as *C. G. Conn Limited v. National Labor Relations Board*, (1939) 108 F. 2d 390; *Home Beneficial Life Ins. Co. v. National Labor Rel. Bd.*, (1947) 159 F. 2d 280 and *National Labor Relations Bd. v. Montgomery Ward & Co.*, (1946) 157 F. 2d 486, apparently on the ground that those cases are inapplicable if the court was in error in this case in stating that the employer was not informed "of any specific demands which these tactics were designed to enforce nor what concessions it could make to avoid them." It would seem to us that if error had been made in that respect the instant case would be exactly identical with the ones cited, because in those cases there was no uncertainty with respect to objective. The unwillingness of the petitioners to be committed to a specific objective in the instant case may, perhaps, make the tactics less defensible than those involved in the cases cited; but the reliance placed by the court upon those cases illustrates that the primary basis of the decision was that the petitioners "did not stop work" (in the words of the petitioners from page 7 of their petition for rehearing) but rather "sought and intended to continue work upon their own notion of the terms that should prevail." As pointed out

in *National Labor Relations Bd. v. Montgomery Ward & Co.*, (1946) 157 F. 2d 486, 496:

"It was implied in the contract of hiring that these employees would do the work assigned to them in a careful and workmanlike manner; that they would comply with all reasonable orders and conduct themselves so as not to work injury to the employer's business; that they would serve faithfully and be regardless of the interests of the employer during the term of their service, and carefully discharge their duties to the extent reasonably required. 35 Am. Jur. p. 514.

* * * While these employees had the undoubted right to go on a strike and quit their employment, they could not continue to work and remain at their positions, accept the wages paid to them, and at the same time select what part of their allotted tasks they cared to perform of their own volition, or refuse openly or secretly, to the employer's damage, to do other work. *C. G. Conn., Ltd. v. N. L. R. B.*, 7 Cir., 108 F. 2d 390; *N. L. R. B. v. Condenser Corp.*, 3 Cir., 128 F. 2d 67; *N. L. R. B. v. Mt. Clemens Pottery Co.*, 6 Cir., 147 F. 2d 262."

The individual contract of hiring under which each employee agrees to conform to certain rules in return for being employed is not eliminated by collective bargaining. *J. I. Case Co. v. National Labor Relations Board*, (1944) 321 U. S. 332, 88 L. ed. 762, 64 S. Ct. 576. The strike as ordinarily conducted does not violate such employment contract because it involves an actual quitting of work and so either a termination or suspension of the contract of employment. The distinction between cases involving the usual form of strike and the situation involved in *C. G. Conn Limited v. National Labor Relations Board*, (1939) 108 F. 2d 390, *Home Beneficial Life Ins. Co. v. National*

7

Labor Rel. Bd., (1947) 159 F. 2d 280, *National Labor Relations Bd. v. Montgomery Ward & Co.*, (1946) 157 F. 2d 486, and the instant case, is that the tactics involved in the latter group do not seek to suspend the contract even temporarily but to retain all its benefits without obligation to carry out its provisions, and that is what was condemned by the Circuit Courts of Appeals in the foregoing cases as an attempt to continue work on terms fixed unilaterally. Such attempt violates the contract of employment under which the violators seek at the same time to hold the other party obligated.

Even the ordinary strike is generally recognized as illegal when it is in breach of a contract. See 1 Teller, *Labor Disputes and Collective Bargaining*, sec. 86. This principle is recognized even in the case cited in support of the petition for rehearing at page 10, i.e., *National Labor Relations Board v. Kalamazoo Stationery Company*, (1947) 160 F. 2d 465 (C. C. A. 6), where the court recognized that activities in violation of an employment contract are not activities protected by federal legislation. It said: "We recognize the right of the employer to discharge employees who strike in violation of their contractual obligations with the employer * * *."

It seems, perhaps, superfluous to discuss early decisions of the National Labor Relations Board which have already been analyzed by this court when, even if they sustained the petitioners' position, they would have been superseded by the many later decisions of the Circuit Courts of Appeal. It is interesting to note, however, that even in the case of *Matter of the Cudahy Packing Co.*, 29 N. L. R. B. 37 cited at page 9 of the petition for rehearing, the National Board pointed out that a few brief work cessations of from 10 to 20 minutes each had not interfered with production or

caused the employer any loss because the employees "appeared to have completed the killing of the scheduled number of animals that day"; and so there was in substance no violation of the employment contract.

X We have here the exact situation which was described in the *Conn. case*, where it is sought not to terminate nor suspend the contract; but to hold the opposite party to all its obligations and to perform on their own side only upon terms prescribed by themselves. It is a situation in which the petitioners "sought and intended to continue work upon their own notion of the terms which should prevail." The right to insist upon all the benefits of a contract and at the same time to refuse to perform it is not one which is protected either by the constitution, or by legislation, regardless of whether the objectives sought to be obtained by such conduct are stated or unstated.

III.

PETITIONERS HAVE FAILED TO GRASP THE COURT'S ANALYSIS OF THE NATIONAL BOARD'S ORDERS PROHIBITING DISCIPLINARY ACTION BY EMPLOYERS IN CERTAIN CASES (In reply to pp. 11 to 13 of Petition for Rehearing)

We feel that the petitioners' distortion of the court's analysis of the National Board orders should not pass unchallenged even though, as the court has pointed out, administrative interpretation is in any event governed by judicial interpretation and superseded by the latter so far as inconsistent.

Federal legislation protects certain lawful activities against interference by an employer. In applying the act and extending the protection afforded by it, the National Board is faced with the necessity of finding motivation for the employer's action in each case. The law does not purport to interfere with the exercise of discipline by an employer except where such discipline is engaged for the purpose of encouraging or discouraging employees in such activities. In determining the motivation for the employer's discipline, surely it is permissible for the board to weigh the severity of the discipline against the seriousness of the act for which it is purportedly imposed. If an employer imposes the severest form of discipline, by discharge, for a comparatively innocuous offense, then the board is warranted in drawing the factual inference that the employer's conduct is for the purpose of interfering with concerted activities rather than for the purpose of preserving necessary discipline.

IV.

THE TYPE OF COERCIVE ACTION INVOLVED IN THIS CASE IS NOT GUARANTEED BY FEDERAL LEGISLATION AGAINST EMPLOYER INTERFERENCE OR OTHERWISE (In reply to pp. 13 to 19 of Petition for Rehearing)

The disputation under Heading IV of the petition for rehearing is primarily repetition of material upon the main issue in controversy, which was argued, briefed and considered at great length in the original hearing. The petitioners unnecessarily reiterate their argument that under

the rule of *Hill v. State of Florida*, (1945), 325 U. S. 538, 65 S. Ct. 1373, 89 L. ed. 1782, state action may not nullify rights guaranteed by federal law, because the court has recognized and followed that principle in this case. The primary issue is whether Congress ever intended to place beyond regulation the type of tactic invented by the petitioners.

Even if we adopt as our sole yardstick the test set out by the petitioners at page 8 of their petition for rehearing, that would of itself necessitate a ruling that the newly devised tactic is not beyond control. The petitioners have said that the same test is to be applied to concerted action as to individual action. If the action of an individual may not be regulated, they say, then the action of a group of individuals in doing the same thing is immune from regulation. We believe that no individual has an inalienable right, emanating either from the constitution or Congressional action, to violate his contract and at the same time insist that the other party to the contract be held to all his obligations under it. Such conduct of an individual surely might be regulated without infringement of his constitutional rights; and *a fortiori* the same conduct by many individuals can be so regulated. The only reason why there is little or no concern for the regulation of conduct by an individual is because it has little impact upon the public welfare; but when the impact is multiplied by concert of action, it may become a matter of public concern. Even if it be true that the enhancement of a problem by concert of action does not of itself affect constitutional tests, it surely may be conceded that such enhancement may remove the problem from a matter of small concern to one of public concern. (The issue is not altered by the petitioners' in-

sistence that the regulation is for the protection of the employer rather than the public. If the regulation were not designed to protect the public interest, it would have been stricken down in state courts.) Likewise regulation dealing with coercion is dependent upon the fact of coercion in an individual case; and that may be shown by the intent and effect of concerted action where it might not be present in the case of isolated action by an individual.

We believe that neither individually nor in concert does one have an inalienable right to violate his agreement while he insists upon a continuation of that agreement.

V.

THE COURT DID NOT ERR IN HOLDING THAT THE NATIONAL BOARD MAY NOT APPROVE A PRACTICE WHICH THE COURTS HAVE HELD CONGRESS DID NOT INTEND TO PROTECT (In reply to pp. 19 to 21 of Petition for Rehearing)

Without intending to minimize the great powers and discretion which have rightly been conferred upon the National Labor Relations Board, it still must be borne in mind that the board is an administrative agency subject to whatever circumscription Congress sees fit to provide; and that such limitations are to be determined by the judiciary. While administrative interpretations of the board undoubtedly do carry great weight with the courts, they could not be binding upon the courts. It is the judicial interpretations which govern the administrative branch and not the reverse.

The petitioners seem to urge as ground for rehearing that courts have no right to consider a question of statutory interpretation but that it must be left to the administrative agency. If that be not a correct representation of their position, their petition leaves little room for doubt that they do object to the question having reached this court in the manner in which it did. While state action appears to be in disrepute with the petitioners in the instant case, the same animus may be transferred to federal control in another case. We see no ground for the apparent assumption that state action must be anti-social and state courts unwise and unjust. The federal government has not yet seen fit to preclude consideration of federal questions in state courts so long as the parties are safeguarded by adequate means of review. If it were deemed that such matters could not be considered in state courts, the federal judicial code would doubtless provide for mandatory removal in all such cases. It has been deemed that justice will be best served by permitting parties to have disputes between them adjudicated by the most convenient means and in the most convenient forum. The fact that a question is adjudicated through one forum rather than another should not preclude the ultimate determination of the question involved so long as all parties were accorded their full rights to be heard in the process. The Supreme Court of the United States is the final authority to adjudicate the questions here raised, and presumably its adjudication would be the same regardless of the route via which the question reached it.

The employer is criticized for not having closed its plant and throwing 2,000 employees out of work so as to invite an unfair practice procedure before the National

Board, in order to determine a question which has here been determined with an avoidance of the industrial strife which both federal and state legislation by their own declarations seek to prevent. If the petitioners' contentions were true that their new coercive tactics are affirmatively guaranteed by federal legislation, it would unquestionably be an unfair practice for an employer to engage in a lock-out as the petitioners assert it should have done; because surely such a lockout would be an "interference" with those rights and any interference with guaranteed rights is an unfair practice. It is the stated purpose of the federal legislation to prevent unfair practices.

Surely no substantial rights have been injured because the questions involved have been adjudicated through the courts instead of by the route of a lockout of 2,000 employees, when the ultimate objective in either case is to obtain the decision of the highest forum in the land upon all of the legal issues which are or could be involved, no matter how the case had reached it.

VI.

THIS COURT DEFINED THE AREA FOR STATE ACTION IN THE MANNER BEST CONCEIVED TO CARRY OUT THE WILL OF CONGRESS AND TO PROMOTE THE PUBLIC WELFARE (In reply to brief Amicus Curiae Congress of Industrial Organizations).

The brief of *amicus curiae* Congress of Industrial Organizations, has twice indicted the court for "a complete misapprehension" of the scope and operation of the National Labor Relations Act. The gist of the argument ap-

pears to be that there *should* not be left to states any power at all to enter the field of industrial conflict—no matter how tremendous may be its impact upon local welfare—except to punish or prevent breaches of the peace. (We will not here dwell long upon the point heretofore argued, that we believe the action here taken by the state falls within even that limited field, but surely an insistence upon retaining and at the same time violating a contract relation freely undertaken comes close to, if not within, the field of breaching the peace in the same manner as does a sitdown strike.)

In furtherance of their arguments, it is suggested that it has “always” been the understanding of labor organizations that the right to strike (and the scope of the argument makes no distinction as to lawful or unlawful strike) was protected against interference, “whether by the states or by private employers”; and that recognition of any right by states to regulate constitutes “utter chaos.” Whatever understanding there has “always” been about the extent of protection accorded strikes by section 7 of the National Labor Relations Act, it could in no event have been of longer standing than the dozen years which have elapsed since the decision of the case of *National Labor Relations Bd. v. Jones & Laughlin S. Corp.*, (1937) 301 U. S. 1, 81 L. ed. 893, 57 S. Ct. 615 in 1937. Before that there had been a substantial doubt of the power of Congress to enter the field. Until that time, regulation of labor relations had been primarily handled by states; and surely if *unrestricted* regulation by states did not result in “utter chaos” the strictly circumscribed regulation permissible under the decision of this court will not have such result.

It seems clear enough to us that the court has said that

states may continue to regulate in the manner which would otherwise be permissible under their police power to the extent that they do not impair rights guaranteed by Congress and do not undertake a function entrusted by Congress exclusively to a federal agency.

Legal pronouncements are rarely susceptible of absolute predictability in boundary line cases; but the yardstick supplied in this case seems to us as definite as any of the rules heretofore adopted relative to respective federal and state jurisdiction.

The primary burden of the argument of *amicus curiae* appears to be that, even if Congress has left room for state action, it should not have done so. We will not endeavor here to marshal the very potent arguments against such an assertion because we believe that it is an argument more properly addressed to Congress—which could, if it chose, and perhaps will, enact a law clearly manifesting its intention “to exclude states from asserting their police power.” To the present time, Congress has indicated its satisfaction with the court’s conclusion that it has “designedly left open an area for state control.”

In the brief of *amicus curiae*, diametrically opposite positions are taken for the apparent purpose of creating a dilemma under which the state action must be held invalid. First it is said that the regulated conduct is guaranteed by federal legislation and is immune from regulation of any kind. In an abrupt about-face it is then said that the conduct is unlawful under the federal act and so it cannot be prevented by the state.

Following the latter argument to its logical conclusion would necessarily contradict the concession of *amicus curiae* that states may punish or prevent breaches of the peace;

because the National Board might conceivably find that such breaches of the peace were unfair practices under the provisions of the federal law relating to refusal to bargain. Congress did not intend to remove from state control conduct which is inimical to the local public welfare when considered independently, merely because such conduct might also be a part of a pattern which would establish an entirely different offense under federal law.

The first horn of the dilemma which *amicus curiae* seeks to create—that the conduct in this case is guaranteed by Congress from any interference at all—has been discussed under preceding headings but we would like to note our belief that it is not the court but the court's friend which is under a "complete misapprehension" of the scope of the National Labor Relations Act. Such misapprehension is revealed by arguments urging, in effect, that it is the primary purpose of the act to encourage and place beyond control all work stoppages without regard to tactics or objectives. Such a contention belies the very words of the Congress which asserted that its primary purpose was to prevent "strikes and other forms of industrial unrest," by substituting other types of concerted activities looking toward amicable adjustment of difficulties so as not to impinge upon the public welfare. Coercive action was sought to be discouraged rather than to be given a status superior to any which it had ever previously enjoyed. The purpose of the law to prevent industrial friction was what made it necessary to announce a rule of construction that the preventive plan did not go so far as to interfere with the right to "strike" as theretofore recognized—that is to engage in a strike lawful both in method and purpose. The law of Wisconsin likewise expressly guarantees that right (see

sec. 111.15). At the same time that Congress expressly provided its rule of construction that its scheme for prevention of industrial conflict should not be construed to interfere with the right to strike, it provided an express rule of construction that it should not "affect the limitations or qualifications" on that right. The exercise of such a coercive weapon has always been qualified, and still is, by the necessity for both proper method and proper objectives.

Respectfully submitted,

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RESPONSE OF BRIGGS & STRATTON CORPORATION TO PETITION FOR REHEARING

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INDEX

Pages

SUMMARY OF ARGUMENT

- A. The case was correctly decided after elaborate presentation, numerous briefs, extended argument in conjunction with two other cases involving similar principles, and over three months' consideration. The Rehearing Brief is primarily a rephrasing of arguments previously made and met in the opinion 1
- B. The decision does not rest upon the question of what or whether demands were made 3
1. The "substantial issue" was whether Congress had protected the particular conduct, and whether or not demands were made was inconsequential to the principles involved 3
2. Most of the purposes for use of the tactic did not involve Union demands, the primary purpose being to enable the Union to exercise control 6
3. The Court was correct in stating that the employer was not informed of specific demands to be met as a condition of cessation of the tactics 7
4. The purpose was not to obtain compliance with the Regional W. L. B. order. The Union itself had petitioned for a review of that order which was pending when the tactics were started 8
5. New demands were made after August 18, 1945, and the demands were changing, even up to the time of the hearing 9

No one ever contended that the tactics were not to enforce some bargaining concessions, but the Wisconsin Board and Court and this Court held, in substance, that the tactics were an attempt by the Union to control the hours and conditions of work	10
C. That the activities were not federally protected is consistent with fundamental principles frequently applied, and a reversal by this Court now would lead to confusion in the body of law relating to state regulatory enactments	11
<p>Petitioners' criticism of the <i>Conn</i> and other cases is unfounded.</p> <p>The Court recognized the underlying implications of the tactics.</p> <p>Petitioners' concession (later withdrawn) that the employer could discharge or discipline, and its present concession that the employer could lockout removes all support from the Petitioners' whole thesis.</p>	
D. Whether the National Board might investigate the <i>employer's</i> conduct if the employer had made a discharge is not determinative of the validity of the state enactment as to <i>employee</i> conduct....	15
<p>Employees are subject to proper state regulation.</p>	
E. Response to Amicus Brief of C. I. O.	17
1. The decision does not impair the right to legitimate strike	17

2. There is no confusion or misconception as to what the Court decided	18
3. The decision is an unanswerable exposition of why this state act is not in conflict with the federal act; further authorities quoted	18
The theory advanced that the tactics would be an unfair refusal to bargain under the federal act is a direct contradiction of Petitioners' basic thesis that the activities are protected by the federal act.	
4. The Union's belief as to the proper fields of federal and state power over strikes or work stoppages is an unsupported expression of desire, untenable in the face of the logic of this Court's decision	21
F. Conclusion	21
The decision is in the best interests of employees, employers and the public; based on sound law and justice, and should be adhered to	
	21

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Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board, — U.S. —, decided March 7, 1949	2, 5
Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Board, 315 U.S. 740	19
American Federation of Labor v. American Sash & Door Co., 335 U.S. 538	11.

Bethlehem Steel Corp. v. N. Y. L. Bd., 330 U.S. 767	19
C. G. Conn Ltd. v. N.L.R.B., 108 F. 2d 390.....	12
Home Beneficial Life Insurance Co. v. Labor Board, 159 F. 2d 280	12
La Crosse Telephone Co. v. Wisconsin Employment Relations Board, — U.S. —, decided January 17, 1949	2
Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525	11, 13
Mintz v. Baldwin, 289 U.S. 346	20
M. K. & T. Ry. Co. v. Harris, 234 U.S. 412.....	20
N.L.R.B. v. Fansteel Metalurgical Corp., 306 US. 240	13
Rice v. Santa Fe Elevator Corp., 331 U.S. 218.....	19
Sinnot v. Davenport, 63 U.S. 243	20
Whitaker v. North Carolina, 335 U.S. 525	11

Other

Daily Congressional Record, June 4, 1947, p. 6540.....	20
"Summary"; Vol. 93, Sup. Ct. Law. ed. Adv. Op. 510	4

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October Term, 1948

Nos. 14 and 15

INTERNATIONAL UNION, U.A.W.A., A.F. of L. LOCAL 232;
ANTHONY DORIA, CLIFFORD MATCHEY, WALTER
BERGER, ERWIN FLEISCHER, JOHN M. CORBETT,
OLIVER DOSTALER, CLARENCE EHRLMAN, HERBERT
JACOBSEN,

Petitioners,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E.
GOODING, HENRY RULE and J. E. FITZGERALD, as
Members of the Wisconsin Employment Relations Board; and
BRIGGS & STRATTON CORPORATION, a Corporation,

Respondents.

**RESPONSE OF BRIGGS & STRATTON
CORPORATION
TO PETITION FOR REHEARING**

**A. The Case was Correctly Decided
After Most Intensive
Consideration.**

While every case presented to this Court is doubtless thoroughly briefed and conscientiously considered by the Court, unusually elaborate presentation of this case was made. The following briefs were filed with this Court:

PAGES

- | | |
|--|----|
| 1. By Union in Support of Petition for
Certiorari | 46 |
|--|----|

2.	By Briggs & Stratton Corporation in Opposition to Petition for Writ	28
3.	By Attorney General of Wisconsin for Wisconsin Employment Relations Board in Opposition to Petition for Writ	28
4.	By Petitioners	78
5.	Appendix to Petitioners' Brief	24
6.	By Briggs & Stratton Corporation	42
7.	By Wisconsin Employment Relations Board	60
8.	Petitioners' Reply	21
9.	Amicus by Commonwealth of Pennsylvania	57
10-17.	Amicus by States of Iowa, Michigan, Nebraska, North Dakota, Tennessee, Florida, Utah and Arkansas	16
18-20.	Amicus by Wisconsin Manufacturers' Association, Northeast Wisconsin Industrial Association and Associated Industries of Oshkosh	25
21.	Amicus by Employers' Association of Milwaukee	16
22.	Amicus by Wisconsin State Industrial Union Council	18

The case was set for oral argument in conjunction with two other cases concerning orders of the Wisconsin Employment Relations Board and interpretations of the Wisconsin Labor Peace Act. Those cases involved similar points with this case as to jurisdiction of the state board, powers of states and questions of alleged conflict of state and federal law. (*La Crosse Telephone Corporation v. Wisconsin Employment Relations Board, et al*, decided January 17, 1949, and *Algoma Plywood & Veneer Company v. Wisconsin Employment Relations Board*, decided

March 7, 1949.) In both of those cases, voluminous briefs were also filed.

The Court allowed counsel substantial additional time for oral argument of the cases. The arguments were heard on November 18 and 19, 1948, and the Court had this case under advisement until February 28, 1949 (about three and one-half months), during which time it was obviously given searching study and intensive consideration.

In the course of the numerous briefs and the lengthy oral argument, every conceivable argument in support of each party's position was vigorously presented, the important ones being repeated in varying forms. The Petitioners' Brief for Rehearing raises nothing new and is largely a rephrasing of arguments previously made and is based on misconceptions of what was decided by this Court. It makes no point which was not fully and squarely met in the opinion in this case, a rereading of which furnishes the answer to the Petition for Rehearing.

**B. Contrary to Petitioners' Assertions,
the Decision Does Not Rest on the
Question of Whether or What
Demands Were Made.**

1. Petitioners' brief asserts (p. 6) that "Inasmuch as this Court referred to the 'unstated ends' with such frequency and with such emphasis so as to conclusively demonstrate that the decision of this Court turned upon that point, and inasmuch as the record does not sustain the finding of this Court that the activities were for 'unstated ends' * * * " etc.

This Court, of course, made no "finding", and as to "frequency" and "emphasis", the opinion, in mentioning

the several facts involved, noted, among other things, that "the employer was not informed during this period of any specific demands which these tactics were designed to enforce nor what concessions it could make to avoid them" (slip op. p. 3). Once near the end of the opinion it used the phrases "unstated ends" (id. p. 18), and "undeclared demands." (id. p. 17).

Not only does the record fully sustain these statements, but the decision in no sense "turned upon that point". This point is actually very inconsequential since, had reference to such facts been wholly omitted from the opinion, the principles involved in the rationale of the decision are such that the result would be precisely the same. If, before each of the production interferences, the Union had made some specific demand, the procedure would still fall squarely within the regulation of the Wisconsin Act, the Wisconsin Board's order would have been the same, the Wisconsin Court's decision the same, and this Court's decision the same. Whether or not a specific demand is made, in the light of the whole pattern here involved, has but slight bearing on the objectionable nature of the conduct or of the state's right to regulate it.

This Court announced plainly the point on which the case turned, saying: "The substantial issue is whether Congress has protected the union conduct which the state has forbidden, and hence the legislation must yield." (id. p. 6), and it then proceeded to analyze and correctly decide that issue consistent with fundamental principles frequently enunciated by this Court and very recently repeated in several other cases.

In the "Summary" of this decision, contained in Supreme Court, Law. ed. Advance Opinions, Volume 93, No. 9, p. 510, the holding is digested thus: " * * * none

of the provisions of the National Labor Relations Act and the Labor Management Relations Act conferred upon employees the absolute right to engage in every kind of strike or other concerted activity, and, in particular, the right to put pressure upon the employer by the recurrent unannounced stoppage of work." That is what the Court correctly held and not the concept sought to be read into the decision by Petitioners.

To meet the Union's claim at its extreme, suppose the Union had said, "We want a 25 cent an hour raise starting tomorrow. If you don't grant it, we are going to pull the employees off the job some time during working hours next week for the balance of the day and repeat that performance at frequent unannounced intervals until you accede." The Wisconsin statute restricts such production interferences (as not being a leaving of the premises to go on strike). The principle of the Wisconsin decision and of this Court's majority opinion is applicable to such a situation precisely as announced, and the ultimate holding would be the same.

The mere fact of whether or not there were "demands" does not govern the question of validity of the activity. The demand itself could be mere sham (as for some plainly preposterous concession) or improper (as to compel an employer to do an illegal act). That this is not imaginary, is established on the record by the fact that one of the Union's numerous demands was for maintenance of membership, although no vote to legalize such a provision under the Wisconsin law had ever been taken until months after the procedure had started (R. 40). In *Algoma Plywood & Veneer Company v. Wisconsin Employment Relations Board*, *supra*, this Court has just sustained the validity of that feature of the Wisconsin Act.

2. That the element of a demand was not a requisite feature of the Union's new tactic is clear on the Union's own testimony, and the principle of this Court's decision was not based on any such feature. Particular demands might or might not be involved in a given situation, and the Union gave these various occasions or reasons for the use of the tactics, most of which have nothing to do with the fulfillment of any Union demands whatever:

- a. The walkouts are "spontaneous, and not of the union officials' action" (R. 37); i.e. at the whim of the employees, for no particular or assigned reason whatever.
- b. "Every walkout has been called for the purpose of attending a union meeting" (R. 49); hence not to strike nor yet to enforce a demand.
- c. The tactic might be applied because of "any new development in negotiations which might arise with respect to neutral boards" (governmental agencies) (R. 46); no question of demands and not dependent on demands.
- d. It might be indulged in because of "any development in direct negotiations with management" (R. 46); not dependent on demands.
- e. The tactic might be employed "any time the leadership feels management has started a rumor detrimental to the union's security" (R. 46). "The meetings serve the union's purpose of preventing 'company inspired' rumors from wrecking the group's solidarity" (R. 87). Again no questions of any demand.
- f. *"The plan was to be able to have such control that when anything threatened our security in the*

~~plan~~ we would be in a position to bring the members together to counteract acts against our union * * * *The union committee would determine when they felt it necessary to exercise that control * * ** (R. 48) ; our emphasis. Again no question of demands, but the clear purpose to *control* the work hours and means of production. (This is elaborated on in this Respondent's original brief herein, pp. 27-32.)

3.. In any event, the record is clear, as the Court said, that "the employer was not informed during this period of any specific demands which these tactics were designed to enforce nor what concession it would make to avoid them" (slip op. 3).

- a. The union doesn't claim there were specific demands before each stoppage.
- b. "The meetings are called without warning and take the company by surprise" (R. 88). Necessarily this had to be without a previous demand which could be accepted to avoid the production break-up.
- c. "The company has been notified that they could be *very instrumental* in avoiding these meetings if they would quit starting rumors to undermine the union" (R. 49), our emphasis. This establishes both that the withholding of the use of the tactic *was not conditioned on the company meeting any demand*, and that even if it should try to accede to what it might believe to be the Union's wish, it would not thereby avoid having the weapon used for any one of a number of other purposes.

d. "At least four or five conferences were held after the work stoppage started where no reference was made to them at all" (R. 48). This substantiates the Court's indication that the Union never sought to negotiate with the company for termination of the practice as part of any terms of collective bargaining, and that cessation of these coercive efforts was never presented to the employer as a condition which would obtain, if any demands of any sort were met. In fact, the delineation (set out above) of the occasions on which, or purposes for which, it intended to use this tactic, establishes that the accession to any given demand or demands would *not* eliminate use of the device.

4. Mr. Doria testified at the hearing to still another purpose of the procedure, saying "The objective was to bring economic pressure against the company to agree to the directive of the Board" (R. 47). It is interesting, but not at all convincing, that Petitioners Brief p. 3 now asserts that the move was only to get the company to accede to the *Regional War Labor Board's* order, in view of the fact that the *Union* itself had in September, 1945 filed a petition for review of that Regional Board's order, which operated to stay the Regional Board order (21 War Labor Reports XXVII) and which order was still under consideration by the National War Labor Board when the tactics were started in November, 1945 (R. 34). The War Labor Board directive, as the Court pointed out in footnote No. 6 (slip op. 3), was not received until weeks after the stoppages started and after that Board had been abolished. There were some nineteen matters in dispute before the War Labor Board (R. 43). One of the demands was for maintenance of membership

which, as noted, the company couldn't legally grant (R. 40).

5. Furthermore, "After V. J. Day (August, 1945) new demands were made on the company by union representatives, primarily relating to wages" (R. 35), our parenthetical insert.

It is perfectly true (and no one has ever asserted otherwise) that the Wisconsin Board found and the Wisconsin Court and this Court specifically stated that the parties had been and were bargaining, and it is clear that the company knew in a general way of some of the things the Union claimed it wanted, and that the tactics were used to attain some concessions from the employer. However, it was also clear that the negotiations were in a fluid bargaining stage, with shifting and changing demands and counterdemands, and the Union demands were still in the process of and susceptible to modification and alteration even as late as the time of the hearing before the Wisconsin Board, as shown by the Union's testimony of its then willingness to make concessions on its demand for maintenance and as to a no-strike clause (R. 47, 48, 49).

Thus, though the nineteen or so issues were in controversy before the War Labor Board for months before the walkouts started, and *new* demands were made after August 18, 1945, and the War Labor Board had the matter under advisement on petition of *both* parties, and its final directive was not received by the company until January, 1946 when the Board was out of existence, and the changing demands were not in final form, the Union, without warning, started the tactics in November, 1945, clearly then *not* to enforce any War Labor Board directive nor any *specific* demands, but simply to try to coerce the employer into amenability and to exercise "control".

6. The Wisconsin Supreme Court, in authenticating the decision of the Wisconsin Board, specifically noted, as this Court noted, that "No demand was made on the company that any or a succession of walkouts would be engaged in unless the company conceded to the terms of the new contract as proposed by the union" (R. 107), and that is the indisputable fact on the record. The important point is that the Wisconsin Board rightly characterized the situation as follows:

"It would seem clear that while the act of quitting in this case was done by mutual understanding that it wasn't a quit in the sense of an intention to quit *until the demands of the union were granted or an agreement had been reached*, but rather an attempt on the part of the employees, by mutual understanding *to determine what hours and under what conditions they would perform any work for the employer.*" (R. 20) our emphasis.

This is what Petitioners now try to argue they were not trying to do, but argument does not supersede the established facts of record.

The essential important fact of the Board's action was that even though the use of the procedure might be for the general purpose of strengthening the Union's hand, the practice was held to be in violation of the Wisconsin Act. Thus, the question of the existence of demands, specific or general, has no essential bearing on the real issue on which this case was decided by the Board, the Wisconsin Court and by this Court, as shown by this Court's statement of what was "the substantial issue".

We agree with the Union that the case should not turn on the question of whether or not Union demands were or were not made, when, where or of what type, but the Court's decision in no way was dependent on any such

slight circumstances and this Court held, in short, that the state's limitation on a concerted interference with production of the type here involved was not barred by the Federal law,—and the factor or element of “demands” is not in the Wisconsin statute at all and is quite unessential to the decision.

**C. The Court Correctly Determined That
the Activities Here Involved Were
Not Federally Protected.**

Petitioners argue under the last three headings in their brief, in substance, that this Court misconceived the extent to which the Federal Act restricts reasonable state regulation of certain types of concerted conduct. This is a reargument of the main contention made by Petitioners in their original appeal and is exactly the “substantial issue” which this Court exhaustively examined and treated in its opinion.

The principles on which this decision is grounded have again been recently and consistently applied by this Court in several cases, including *Lincoln Federal Labor Union et al v. Northwestern Iron & Metal Co.* and *Whitaker v. North Carolina*, 335 U.S. 525, and *American Federation of Labor v. American Sash & Door Company*, 335 U.S. 538, all decided January 3, 1949, and the *Algoma* case, *supra*, decided March 7, 1949. A reversal of itself now by this Court of its well-reasoned, original opinion, in the light of these other cases, would not only be illogical and inconsistent, but could cause incalculable confusion, not only in our body of labor law, but in the whole field of law relating to the state regulatory enactments.

Furthermore, it would lead to the impossible situation (visualized by this Court in the third last paragraph of

its opinion) since the activity would be subject neither to state nor federal regulation, and in addition, the employer would be helpless to take any steps to control his own production or the orderly operation of his plant.

The Petitioners' criticism of this Court's alleged misconception of the *Conn, Home Beneficial* and several Board cases is unfounded. In the *Conn* case, the employees there were making lawful demands for "an increase of 15% on all piece work prices or, time and one-half for all overtime over 40 hours per week" (108 F. 2d at 394); i.e. an improvement in wages or hours. There was a perfectly legitimate, single, simple alternative demand, of which the employer was informed in writing. If there were anything to the Union's "demand" argument discussed above, here indeed was a case in which the result would have been different from what it was.

Petitioners say that case was decided as it was because the employees "sought and intended to continue work upon their own notion of the terms which should prevail", (Pet. Br. p. 7), which is exactly what the Wisconsin Board found the Union here was trying to do. (See excerpt quoted above from R. 20). Actually the *Conn* decision holds that the objectionable *method*, and not the legitimate objective, was unprotected by the National Act.

What has been said applies equally to the *Home Beneficial Life* case where again the object was the perfectly legitimate one of trying to persuade the employer to change one of the working conditions, and again it was the *method*, not the object, which the Court condemned when it said:

"The statute * * * does not and could not confer on them the right to engage en masse in unlawful activities * * *" 159 F. 2d at 284.

Petitioners' brief, as if repetition constitutes proof, asserts, in varying terms, "that an employer is prohibited from interfering with concerted activities which are protected by section 7 by *any* method * * *" (Pet. Br. p. 12), our emphasis. That such is not the law is firmly established by numerous cases, of which, to name but one, the *Fansteel* case is typical. This Court, there speaking through the Chief Justice, said:

"But this recognition of 'the right to strike' plainly contemplates a lawful strike * * *" 306 U.S. at p. 256.

Petitioners disregard the fact that this is a form of concerted activity which the state has found to be an injurious practice in its internal business affairs, and "offensive to the public welfare". *Lincoln Federal* case, supra, Vol. 93, Law. ed. Adv. Op. at p. 208.

Though we do not agree with Petitioners' analysis of the *Harnischfeger*, *Cudahy* and *Armour* Board cases, we will not discuss them further, in view of this Court's statement that "* * * in no event could the Board adopt such a binding practice as to the scope of section 7 in the light of the construction, with which we agree, given to section 7 by the Courts of Appeal * * *" (slip op. p. 10).

This Court had no trouble in cutting through the arguments and pointing to the real danger when it said:

"If we were to read section 13 as we are urged to do * * * the effect would be to legalize beyond the power of any state or federal authorities to control not only the intermittent stoppages such as we have here but also the slowdown and perhaps the sit-down strike as well * * * *And this is not all*; the management also would be disabled from any kind of self-help to cope with these coercive tactics * * *" (slip op. p. 17). Our emphasis.

In short, were the Court to adopt the Petitioners' position, it would give blanket endorsement to the Union's avowed intention, which was that "the plan was to be able to have * * * control" (R. 48).

This Court put its finger squarely on the dilemma in which industry would find itself if the Petitioners could employ this tactic without any regulation, when it said:

"To dismiss or discipline employees for exercising a right given them under the Act or to interfere with them or the union in pursuing it is made an unfair labor practice and if the rights here asserted are rights conferred by the Labor Management Relations Act, it is hard to see how the management can take any steps to resist or combat them without incurring the sanctions of the Act." (slip op. p. 17).

The correctness of that statement is found in Petitioners' own argument. The members of the Court may recall that in the oral argument Petitioners' counsel attempted to minimize the grave underlying consequences of the procedure; namely, its practical transfer of management's function of scheduling work, and hence its other functions, to the Union whose "committee would determine when they felt it necessary to exercise that control * * *" (R. 48), as Mr. Doria so bluntly put it. Counsel, therefore, originally said on oral argument that the company could punish the employees by discipline, including, if necessary, *discharge*. On pressing questioning on this point by members of the bench, and seeing the inconsistency into which he was being driven, he then changed and said the company could not go so far as to discharge, —that would be too harsh, but it might "discipline", presumably by a lay-off.

Apparently appreciating that even the concession of the employer's right to "discipline" takes the supports

from under the Petitioners' main thesis (which is that this activity is *protected* under the National Act), that concession is not made in Petitioners' present brief. But, astonishingly, and still presumably to gloss over the underlying implications of the uncontrolled use of the device, Petitioners' brief blandly says:

"This court has also overlooked the fact that the sole basis of the employer's complaint is the fact that the employees had not gone out on a conventional, full-time strike. Yet the employer could very easily have created that very situation by closing its plant until such time as the dispute over the new contract was settled. This it had a right to do, without running afoul of the National Law." (Pet. Br. p. 20).

Not only is there no authority cited for this unilaterally developed conclusion, but it is necessarily directly at odds with the fundamental basis of Petitioners' case. If the activity is *protected*, how then could the employer retaliate with the more drastic measure of a lock-out having as its object the coercing of the employees to give up the "protected" activity? No, the Union's own argument demonstrates the fallacy thereof.

D. What the National Board Might Have Done Had the Employer Discharged the Employees is Beside the Point.

Petitioners argue that if the employer had any doubt as to his rights he might have precipitated an unfair labor practice complaint case against himself; that he might have discharged one, or presumably all two thousand employees; that then the Union presumably might have filed charges; that the National Board would "investigate", and, of course, if the Union is correct, that Board

would, after hearings and all the procedures of the Board were utilized, then find the employer guilty and order reinstatement with back pay. This is scarcely a comforting solution for an employer intent on ascertaining his lawful rights by peaceful legal procedures.

Presumably, then the employer would have to appeal to have a Federal Circuit Court of Appeals pass on the legal issues, and thence, ultimately, the case could arrive before this Court where precisely the same issues would have been presented as were presented and passed on by this Court in this case.

It scarcely needs argument that the conjecture, as to what might have been a way to get the validity of this state statute passed on, has no relevancy to the question of whether or not that statute is valid. The mere fact that the National Board might have taken jurisdiction of a (hypothetical) discharge case, and in the course of deciding it would be obliged to consider all properly applicable laws, including state laws, in no way establishes that the state law is invalid or over-ridden by the federal law. Even had the National Board in such a case held the state law invalid, as being in conflict with the National Act, that determination of law would in no sense be binding on the Courts on review.

This Court said (slip op. 7) :

"There is no existing or possible conflict or overlapping between the authority of the federal and state Boards, because the federal Board has no authority to investigate, approve or forbid the *union* conduct in question. This conduct is governed by the state or it is entirely ungoverned." (our emphasis).

What the Federal Board could or could not do about an employer's conduct in discharging an employee can't possibly affect the question of whether this statute pertaining to employee conduct is valid.

Petitioners ignore the fact that employees, regardless of the rights accorded them by the Federal Act, are also amenable to countless state regulatory acts, which the Federal Act cannot possibly override. The *Fansteel* case, again, is typical of a situation in which the state laws, with respect to peace and order, intervened to make illegal, concerted conduct, which, on the face of the bare words of section 7 of the National Act, would have been lawful and "protected".

E. Response to Amicus Curiae Brief of Congress of Industrial Organizations.

We received, on the afternoon of March 31, the brief above referred to. The short time within which our response must be filed does not permit an extended response to that brief, nor is such required. We will comment briefly on each of the sections of that brief under the number used therein.

I.

Counsel is unduly exercised over what he believes to be the scope of the decision, which in no way impairs the right to the legitimate strike. For the eminently sound reasons explicitly indicated in the decision, it merely holds that the particular tactics instantly involved are not precluded by the Federal Act from reasonable regulation by the state.

II.

The charge of confusion and misconception by the Court as to what it was deciding is almost an affront, since

any fair reading of the decision cannot lead to any of the four alleged uncertainties set forth as to what the decision holds.

(1) The Court did not say that the National Act was inapplicable because the activities were or were not a strike, since that was unnecessary to the decision.

(2) The decision, of course, does not say that states may regulate or prohibit strikes or other concerted employee activities which this Court might agree, for some reason, were improper.

(3) The decision does hold that the state may police these particular activities as it could police strike activities because "Congress has not made such employee or union conduct as is involved in this case subject to regulation of the federal Board." (slip op. p. 7).

(4) The decision of course does not say that the state may prohibit any activity as long as it does not make it illegal merely because it is undertaken by workers acting in concert.

The decision plainly, clearly and simply holds that the provisions of the National Act have not conferred upon employees the absolute right to engage in every conceivable kind of a concerted activity, particularly the activity involved in this case, pursuant to which control of a business could be as effectively taken over as in the slowdown or sit-down.

III.

The decision itself adequately answers the argument that the National Act has occupied the entire field of the subject here involved. That Congress expressed no such intention in the original Wagner Act has been declared

by this Court when it said "Congress has not seen fit to lay down even the most general of guides to construction of the Act, as it sometimes does, by saying that its regulation either shall or shall not exclude state action." *Bethlehem Steel Company v. New York Labor Relations Board*, 330 U.S. 767 at 771 and this Court again expressly said of the Wagner Act that Congress "designedly left open an area for state control." *Allen Bradley Local No. 1111 vs. Wisconsin Employment Relations Board*, 315 U.S. 740 at 750.

The Labor Management Relations Act of 1947 left unchanged the basic pattern of Federal regulation of labor relations adopted in the Wagner Act, "So that we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corporation*, 331 U.S. 218 at 230. Not only is such "clear and manifest purpose" not indicated by that Act, but, on the contrary, its language and legislative history demonstrates that Congress, far from desiring to pre-empt state action, set out to encourage state laws to supplement the Federal scheme of regulation, and, during the debate on the conference agreement on the Act, several discussions on this point took place, of which the following is an adequate example:

"Mr. Kersten: Wisconsin and other states, have their own labor relations laws. We are very anxious that disputes be settled at the state level insofar as it is possible. Can the gentleman give us assurance on that proposition, so that as a matter of record, that is the sense of the language of the report?

"Mr. Hartley: That is the sense of the language of the bill and of the report. That is my interpretation of the bill, that this will not interfere with the

State of Wisconsin in the administration of its own laws. In other words this will not interfere with the validity of the laws within that state.

"Mr. Kersten: And it will permit as many of these disputes to be settled at the state level as possible?"

"Mr. Hartley: Exactly." Daily Congressional Record June 4, 1947, p. 6540.

In testing, therefore, whether a given state law conflicts with the provisions of a Federal Act, this Court has always followed this early statement:

"* * * in the application of this principle of supremacy of an Act of Congress in a case where the state law is but the exercise of a reserved power, the repugnance or conflict should be *direct and positive*, so that the two acts could not be reconciled or consistently stand together;" *Sinnot v. Davenport*, 63 U. S. 243 at 247; our emphasis.

This Court has repeatedly, and as late as in the "closed shop" cases, *supra*, been very reticent to hold a state law enacted under the reserved police power to be in conflict with Federal law.

"These cases recognize the established rule that a state law enacted under any of the reserved powers—especially if under the police power—is not to be set aside as inconsistent with an Act of Congress, unless there is actual repugnancy, or unless Congress has, at least manifested a purpose to exercise its paramount authority over the subject." *M. K. & T. Ry. Co. v. Harris*, 234 U.S. 412 at 418.

In connection with that intent, this Court has said "The intention to do so must *definitely and clearly* appear." *Mintz v. Baldwin*, 289 U.S. 346 at 350 (our emphasis).

The unanswerable exposition of why this particular state act is not in conflict with the Federal Act is contained at length in this Court's decision now under attack

Now we come to a most amazing theory advanced for the first time in this amicus brief, to the effect that the Union's tactics here would constitute a refusal to bargain under the National Act, and that, therefore, these tactics "would probably be an unfair labor practice under the Federal act" (Br. p. 6, 7). This is an unqualified and astounding reversal of the Petitioners' whole argument to the effect that these tactics are not only *permitted* but are *protected* by the Federal Act. In the attempt, therefore, to try to demonstrate by that conclusion that the Federal Act has pre-empted control over this particular activity, counsel defeats his own aims, since if the argument were correct, then the state act, in classifying the activities as unfair, not only is not in conflict with the Federal Act, but in complete harmony with it and is implementing its purposes. If that argument is valid, one may well ask, just what is this case all about and why did the Union ever appeal?

IV.

The Union's "tentative" analysis of what it believes "to be the proper fields of federal and state power over strikes or work stoppages affecting interstate commerce" (Br. p. 7), is merely an expression of its desires, unsupported by authority, and untenable in the face of the adequate demonstration by this Court, in its present decision, of the proper scope and sphere of the federal and state acts as applied to the tactics here before the Court.

F. Conclusion.

The holding here is in complete accord with this Court's own decisions. It was essential in the best interests of

employees, employers and the public alike. It is based upon correct principles of sound sense, sound law and sound justice, and should be adhered to.

Respectfully submitted,

EDGAR L. WOOD AND

JACKSON M. BRUCE

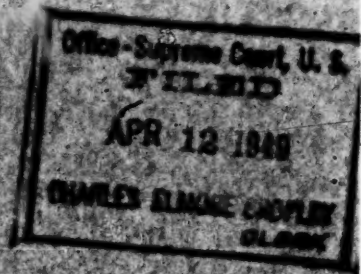
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Nos. 14 and 15

In the Supreme Court of the United States

OCTOBER TERM, 1948

**INTERNATIONAL UNION, UNITED AUTOMOBILE
WORKERS OF AMERICA, A. E. L. LOCAL 232;
ANTHONY DONIA, CLIFFORD MATCHETT, WALTER
BRADY, ERWIN FLEISCHER, JOHN M. CORBETT,
OLIVER DOSTABLER, CLARENCE EHREMAN, BERT
JACOBSEN, LOUIS LAMB, PETITIONERS**

v.

**WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E.
GORDING, HENRY BULL, AND J. E. FITZGIBBON,
AS MEMBERS OF THE WISCONSIN EMPLOYMENT
RELATIONS BOARD, AND BRIDGES & STRATTON
CORPORATION, A CORPORATION**

**ON WRIT OF HABEAS CORPUS TO THE SUPREME COURT OF
THE STATE OF WISCONSIN**

**BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD
AS AMICUS CURIAE IN SUPPORT OF PETITION FOR
REHEARING**

INDEX

Introduction.....	Page 2
I. In enacting the Labor Management Relations Act, 1947, Congress intended to occupy the entire field of labor relations in industries affecting interstate commerce...	2
A. Congress undertook comprehensively to define the rights of employees, employers and labor organizations in their relations with each other insofar as interstate commerce was affected...	2
B. Except as specifically stated in the Act and in the legislative history, Congress intended to exclude the states from the area dealt with by Congress in the statute.....	12
C. The National Board is empowered to decide whether or not the work stoppages here involved are concerted activities protected by Section 7, and also whether they constitute unfair labor practices under Section 8 (b) 1....	19
D. The scheme and structure of the Act, as well as the intention of Congress, requires that the states be precluded from deciding questions of labor relations affecting interstate commerce which are committed to the discretion of the National Board subject to review by the federal courts.....	32
1. Preservation of the National Board's power to determine whether particular types of concerted activities are or are not protected by Section 7 requires that the states be precluded from enjoining activities merely because they do not comport with local labor relations policies.....	36
2. Allowing the states concurrent power with the National Board to decide whether particular forms of work stoppages in aid of collective bargaining are permissible introduces local variations into the application of federal policy contrary to the intention of Congress.....	38

Introduction—Continued

I. In enacting the Labor Management—Continued

D. The scheme and structure—Continued

* Page

3. Preservation of the "division of responsibility" between the National Board and the federal courts in administration of the National Act requires that the states be precluded from passing upon questions which the federal courts are empowered to consider upon review of orders of the National Board.....

46

- E. The *Allen-Bradley* case and similar decisions of this Court do not imply that the states are free to exercise concurrent jurisdiction with the National Board in the field of labor relations..

48

1. The states are free to deal with conduct by employees and employers in the course of labor disputes affecting interstate commerce only on grounds independent of, and apart from, labor-relations policy.....

48

2. If the states were permitted to judge the propriety of work stoppages in aid of collective bargaining in terms of local labor-relations policy-rights guaranteed by the federal Act would be subject to impairment by the states.....

53

- II. Clear evidence of Congressional intention, as well as consideration of the severe impact upon administration of the National Act which would result from application of local labor relations policies to interstate industries, requires the conclusion that Congress preempted the field of labor relations affecting interstate commerce.....

58

Conclusion.....

62

CITATIONS

Cases:

- Algoma Plywood Co. v. Wisconsin Employment Relations Board*, decided March 7, 1949, No. 216, this Term..... 16
- Allen-Bradley Local v. Wisconsin Employment Relations Board*, 315 U. S. 740..... 7, 48, 49
- Amalgamated Association, etc. v. Dixie Motor Coach Co.*, 170 F. 2d 902..... 43
- Amazon Cotton Mill Co. v. Textile Workers Union*, 167 F. 2d 183..... 15, 43
- American Manufacturing Company, Matter of*, 5 N. L. R. B. 443, enforced, 106 F. 2d 61, affirmed, 309 U. S. 629..... 22

III

Cases—Continued

Page

<i>Bethlehem Steel Co. v. New York State Labor Relations Board</i> , 330 U. S. 767.....	13, 17, 39, 41, 42, 59, 60, 61
<i>Cloverleaf Butter Co. v. Patterson</i> , 315 U. S. 148.....	59, 61
<i>Cudahy Packing Company, Matter of</i> , 29 N. L. R. B. 837.....	22, 25
<i>Eastern Central Ass'n v. United States</i> , 321 U. S. 194.....	47
<i>G. C. Conn, Ltd. v. National Labor Relations Board</i> , 108 F. 2d 390.....	26, 27, 28
<i>Goodrich Co., B. F., Matter of, National Labor Relations Board Case No. 9, C. A. 80</i>	28
<i>Harnishfeger Corp, Matter of</i> , 9 N. L. R. B. 676.....	23, 25
<i>Hill v. Florida</i> , 325 U. S. 538.....	49, 54, 59
<i>Hines v. Davidowitz</i> , 312 U. S. 52.....	59
<i>Home Beneficial Life Insurance Co. v. National Labor Relations Board</i> , 159 F. 2d 280, certiorari denied, 332 U. S. 758.....	24, 26, 27, 28
<i>International Longshoremen's & Warehousemen's Union (C. I. O.), Local 6, et al., and Sunset Line & Twine Co., Matter of</i> , 79 N. L. R. B. No. 270.....	29
<i>Kennametal, Inc., Matter of</i> , 80 N. L. R. B. No. 233.....	23
<i>La Crosse Telephone Corp. v. Wisconsin Employment Relations Board</i> , 336 U. S. 18.....	37, 41, 61
<i>Medo Photo Supply Corp. v. National Labor Relations Board</i> , 321 U. S. 678.....	35
<i>National Labor Relations Board v. Clinton Woolen Mfg. Co.</i> , 141 F. 2d 753.....	23
<i>National Labor Relations Board v. Condenser Corp.</i> , 128 F. 2d 67.....	26
<i>National Labor Relations Board v. Draper Corp.</i> , 145 F. 2d 199.....	25, 55
<i>National Labor Relations Board v. E. C. Atkins & Co.</i> , 331 U. S. 398.....	19, 34
<i>National Labor Relations Board v. Fansteel Corp.</i> , 306 U. S. 240.....	22, 50
<i>National Labor Relations Board v. Hearst Publications, Inc.</i> , 322 U. S. 111.....	19, 28, 33, 35, 40, 41, 47
<i>National Labor Relations Board v. Indiana Desk Co.</i> , 149 F. 2d 987.....	26
<i>National Labor Relations Board v. Jones & Laughlin Steel Corp.</i> , 331 U. S. 416.....	19, 34
<i>National Labor Relations Board v. Kalamazoo Stationery Co.</i> , 160 F. 2d 465, certiorari denied, 332 U. S. 762.....	24, 55, 56
<i>National Labor Relations Board v. Mackay Radio & Telegraph Co.</i> , 304 U. S. 333.....	22
<i>National Labor Relations Board v. Sands Mfg. Co.</i> , 306 U. S. 332.....	50
<i>National Labor Relations Board v. Waterman Steamship Co.</i> , 309 U. S. 206.....	35

IV

Cases—Continued

	Page
<i>National Maritime Union of America (C. I. O.) et al. and Texas Co., Matter of</i> , 78 N. L. R. B. No. 137.....	29
<i>New York Central R. Co. v. Winfield</i> , 244 U. S. 147.....	61
<i>Perry Norvell Co., Matter of, and United Shoe Workers of America (C. I. O.) et al.</i> , 80 N. L. R. B. No. 47.....	30, 31
<i>Pollock v. Williams</i> , 322 U. S. 4.....	58
<i>Republic Aviation Corp. v. National Labor Relations Board</i> , 324 U. S. 793.....	19, 32, 35, 47
<i>Rice v. Santa Fe Elevator Corp.</i> , 331 U. S. 218.....	13
<i>Securities and Exchange Commission v. Chenery Corp.</i> , 318 U. S. 80.....	47
<i>Sinnot v. Davenport</i> , 22 How. 227.....	59
<i>Spencer Auto Electric, Inc., Matter of</i> , 73 N. L. R. B. 1416....	24
<i>Southern Steamship Co. v. National Labor Relations Board</i> , 120 F. 2d 505, reversed, 316 U. S. 31.....	51, 56
<i>Underwood Machinery Co., Matter of</i> , 74 N. L. R. B. 641....	26, 30
<i>United Furniture Workers of America, Local 309 (C. I. O.) et al., and Smith Cabinet Mfg. Co., Matter of</i> , 81 N. L. R. B. No. 138.....	30

Statutes:

Labor-Management Relations Act, 61 Stat. 136, 29 U. S. C. (1946 ed. Supp. I) 141:	
Sec. 1 (b).....	2, 3
202 (c).....	16
203.....	12
301.....	6
302.....	6, 12
303.....	6, 12, 43
304.....	6, 12
305.....	6
401.....	6
501 (2).....	60
Title II.....	
5	
National Labor Relations Act, 49 Stat. 449, 29 U. S. C. (1946 ed.), 151, et seq.	
Sec. 8.....	20, 21
Sec. 10 (a).....	12, 13
Sec. 13.....	21
National Labor Relations Act as amended by the Labor-Management Relations Act, 61 Stat. 136, 29 U. S. C. (1946 ed. Supp. I) 141:	
Sec. 2 (3).....	19, 20, 41
7.....	4, 10, 19, 20, 22, 23, 24, 25, 27, 42, 44, 46, 52, 55, 60
8.....	18, 19
8 (a).....	4, 20, 21, 34
8 (b).....	4, 5, 6, 7, 9, 10, 29, 30, 32, 43, 54, 60, 61
8 (d).....	5, 12, 16, 52
9.....	5

Statutes—Continued

National Labor Relations Act as amended—Continued

Page

9 (f).....	12
9 (g).....	12
9 (h).....	12
10 (a).....	14, 16, 17, 44, 45
10 (c).....	12
10 (e).....	34
10 (f).....	34
10 (j).....	12
10 (l).....	12
14 (b).....	16

Wisconsin Stat. (1947), c. 111, Sec. 111.06 (2) (h).....	61
--	----

Miscellaneous:

93 Congressional Record:

A-3370.....	15
3453-3454, 6519-6520, 6532.....	16
4019, 4021, 4024, 4428.....	7
H. R. 3020, 80th Cong., 1st Sess.....	8, 9, 10
H. Conf. Rep. No. 510, 80th Cong., 1st Sess.:	
Pp. 38-39.....	10, 11
Pp. 41-42.....	51
P. 42.....	9
P. 52.....	15
P. 59.....	10, 11
H. Rep. No. 1147, 74th Cong., 1st Sess., pp. 9, 16.....	7, 13
H. Rep. No. 245, on H. R. 3030, 80th Cong., 1st Sess.:	
P. 40.....	14, 16
P. 44.....	14
H. Minority Rep. No. 245 on H. R. 3020, 80th Cong., 1st Sess.:	
P. 90.....	15
National Labor Relations Board, Thirteenth Annual Report (Govt. Print. Off. (1949)), p. 18.....	18
Report of the Joint Committee on Labor Management Relations, 80th Cong., 2d Sess., p. 31.....	18
S. 1126, 80th Cong., 1st Sess.....	52
S. Rep. No. 573, 74th Cong., 1st Sess.:	
Pp. 4-5.....	13
P. 6.....	20, 21
P. 8.....	20
P. 10.....	33
P. 15.....	13
P. 16.....	7
Pp. 18-19.....	21
S. Rep. No. 105, on S. 1126, 80th Cong., 1st Sess.:	
Pp. 20-21, 23.....	52
P. 50.....	8

In the Supreme Court of the United States

OCTOBER TERM, 1948

Nos. 14 and 15

**INTERNATIONAL UNION, UNITED AUTOMOBILE
WORKERS OF AMERICA, A. E. L., LOCAL 232;
ANTHONY DORIA, CLIFFORD MATCHEY, WALTER
BERGER, ERWIN FLEISCHER, JOHN M. CORBETT,
OLIVER DOSTABEER, CLARENCE EHLMANN, BERT
JACOBSEN, LOUIS LASS, PETITIONERS**

v.

**WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E.
GOODING, HENRY RULE, AND J. E. FITZGIBBON,
AS MEMBERS OF THE WISCONSIN EMPLOYMENT
RELATIONS BOARD, AND BRIGGS & STRATTON
CORPORATION, A CORPORATION**

**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
THE STATE OF WISCONSIN**

**BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD
AS AMICUS CURIAE IN SUPPORT OF PETITION FOR
REHEARING**

INTRODUCTION

The National Labor Relations Board deeply regrets that it did not appreciate the full significance of the issues presented by this case while it was pending before the Court on writ of cer-

tiorari. The impact of the opinion upon administration of the National Act is, however, so direct and, in the Board's view, so seriously adverse that the Solicitor General conceives it to be his duty to bring this situation to the attention of this Court.

The opinion of the Court authorizes the states to deal with matters which the National Board believes were intended by Congress to be committed exclusively to the Board's jurisdiction. The Court's opinion also impairs the scheme established by Congress for uniform interpretation and administration of national labor relations policy and permits the erection of local barriers to the effectuation of national objectives. The Solicitor General respectfully urges that this Court grant rehearing and reconsider the question presented.

I

IN ENACTING THE LABOR MANAGEMENT RELATIONS ACT, 1947, CONGRESS INTENDED TO OCCUPY THE ENTIRE FIELD OF LABOR RELATIONS IN INDUSTRIES AFFECTING INTERSTATE COMMERCE

A. CONGRESS UNDERTOOK COMPREHENSIVELY TO DEFINE THE RIGHTS OF EMPLOYEES, EMPLOYERS AND LABOR ORGANIZATIONS IN THEIR RELATIONS WITH EACH OTHER INsofar AS INTERSTATE COMMERCE WAS AFFECTED.

In Section 1 (b) of the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C. (1946 ed., Supp. I) 141 (b)) Congress declared:

It is the purpose and policy of this Act, in order to promote the full flow of com-

merce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

Congress embarked upon this program in the conviction that (Section 1 (b)) "if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts and practices which jeopardize the public health, safety, or interest," then, "Industrial strife * * * can be avoided or substantially minimized."

Succeeding sections of the Act,¹ together with its legislative history, demonstrate that after

¹ The 1947 Act begins at 61 Stat. 136, and 29 U. S. C. (1946 ed. Supp. I) 141. The National Labor Relations Act, prior to the 1947 amendments, 49 Stat. 449, appears at 29 U. S. C. (1946 ed.), 151 *et seq.*, and as amended at 29 U. S. C. (1946 ed., Supp. I), 431 *et seq.* Copies of the Act, as amended, are filed with this brief for the convenience of the Court.

canvassing the entire field of labor relations Congress formulated such rights, duties, liabilities, and immunities in this field as it deemed desirable to create, and vested in federal agencies, particularly the National Labor Relations Board, power to interpret and define the privileges and obligations created by the Act. Except to the extent that it specifically left particular issues to state control (see *infra*, pp. 15-16), Congress intended that all issues arising in the field of labor relations, as such, involving interstate industries, should be dealt with under federal law.

In Section 7 of the National Labor Relations Act, as amended, Congress reaffirmed the original Act's grant to employees of the "right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." It added to that section, however, the right of employees "to refrain from any or all of such activities." In Section 8 (a) of the amended Act Congress defined certain unfair labor practices of employers, in substance those which had been defined as such by the initial Act. In Section 8 (b) Congress defined certain unfair labor practices of labor organizations, a subject not covered in the initial Act. Among these are: restraining or coercing employees in the exercise of rights guar-

anted by Section 7 (Section 8 (b) (1) (A)); restraining or coercing an employer in the selection of his collective bargaining representative (Section 8 (b) (1) (B)); causing an employer to discriminate against employees in violation of Section 8 (a) (3), (Section 8 (b) (2)); refusing to bargain collectively (Section 8 (b) (3)); engaging in secondary boycotts (Section 8 (b) (4) (A) and (B)); striking to induce an employer to deal with one labor organization if another has been certified by the Board (Section 8 (b) (4) (C)); engaging in jurisdictional strikes (Section 8 (b) (4) (D)); charging excessive initiation fees (Section 8 (b) (5)); and engaging in particular types of featherbedding practices (Section 8 (b) (6)). Section 8 (d) comprehensively defined the term collective bargaining, and imposed additional obligations upon both employers and employees with respect to termination and modification of collective agreements.

Section 9 defines the rights of employees, employers, and labor organizations in representation matters, provides additional standards to guide the National Board in the exercise of its discretion in such cases, and conditions access to the National Board upon compliance by labor organizations with certain filing, reporting and affidavit requirements.

Title II of the Labor-Management Relations Act, 1947, deals comprehensively with the subject

of conciliation of labor disputes and provides a procedure for handling disputes which create national emergencies. Title III authorizes the bringing of suits by and against labor organizations in the federal courts (Section 301); makes unlawful certain types of payments by employers to representatives of employees, and regulates the establishment of welfare funds pursuant to collective bargaining (Section 302). It authorizes any person injured by certain conduct of labor organizations constituting unfair labor practices under Section 8 (b) (4) of the Act, as amended, to bring a civil suit for damages against the offending organization (Section 303). It imposes restrictions upon political contributions and expenditures by labor organizations (Section 304), and outlaws strikes by government employees (Section 305). Title IV establishes a Joint Committee of Members of both Houses to "conduct a thorough study and investigation of the entire field of labor management relations" (Section 401).

The legislative history of the provisions of the National Act, as amended, which deal with unfair labor practices by labor organizations, and particularly Section 8 (b) (1) (A), which makes restraint and coercion of employees in the exercise of rights guaranteed them by Section 7 an unfair labor practice, demonstrates, we believe, that Congress, after considering many possi-

bilities, carefully selected those types of conduct which it desired specifically to protect or prohibit and the remedies it wished to be followed, and that its failure to go further was a deliberate choice that there should be no further regulation in the field of labor relations in interstate industry. This, of course, would not preclude such state regulation as is specifically authorized by the federal statute. Nor, as we shall show (*infra*, pp. 48-52), would it preclude the application of general state laws outside the field of labor relations, such as those relating to violence, intimidation, and breach of contract.

Section 8 (b) (1) (A) was included in the bill as enacted only after Congress rejected the argument that restraint and coercion of employees by labor organizations, at least when it took the form of fraud, violence, threats, mass picketing, etc., should not properly be considered a matter of labor relations at all, and that this subject should be left to the States to handle as police court matters. 93 Cong. Rec. 4019, 4021, 4024, 4428. This argument, as the Court noted in *Allen-Bradley Local v. Wisconsin Employment Relations Board*, 315 U. S. 740, prevailed when the Wagner Act was adopted, and accounted for the absence of a similar provision in that Act (S. Rep. No. 573, 74th Cong., 1st Sess., p. 16; H. Rep. No. 1147, 74th Cong., 1st Sess., p. 16). But the 80th Congress took the view that when restraint and coercion impinged upon the self-or-

ganizational rights of employees, the matter should properly be dealt with in its labor relations context by the federal government, although the acts themselves might properly be punished or enjoined by the states on independent grounds. Senate Report No. 105, Supplemental views of Senators Taft, Ball, Donnell and Jenner, 80th Cong., 1st Sess., p. 50.

The original House Bill, H. R. 3020, 80th Cong., 1st Sess., contained provisions making it an unfair labor practice for employees or individuals acting in their behalf to interfere by "intimidating practices" with the exercise of rights guaranteed by Section 7 (Section 8 (b) (1)) and to participate in strikes for other than specified objectives (Section 8 (b) (3)). The bill made it an unfair labor practice for a labor organization to interfere with, restrain or coerce individuals in the exercise of rights guaranteed in Section 7 (b) (Section 8 (c) (1)), and, *inter alia*, to call a strike without authorization from a majority of the employees voting by secret ballot (Section 8 (c) (8)). The bill also, in Section 12 (a), defined certain "concerted activities" as "unlawful," among them the use of "force or violence or threats thereof" in the course of strikes or picketing, mass picketing (Section 12 (a) (1)); stranger picketing (Section 12 (a) (2)); and "concerted interference with an employer's operations conducted by remaining on the employer's premises" (Section 12 (a) (3) (A)). As remedy

for these unlawful acts the bill provided that persons injured could sue for damages and injunctive relief in the federal courts (Section 12 (b) and (c)), and that persons found to have engaged in such activity should be deprived of rights under the Act.

Except to the extent that the Act incorporated Section 8 (c) (1) of the House Bill, modified by deletion of the word "interfere," as Section 8 (b) (1), the Congress rejected these proposed provisions. The Report of the Conference Committee pointed out (H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 42), that Section 8 (b) (1) treated as unfair labor practices all of the activities which would have been termed "unlawful concerted activities" by Section 12 (a) (1) of the House Bill, but only "some of the activities which were proscribed in the other paragraphs of Section 12 (a).?" It further noted that in place of the sanctions (suits for damages and injunctions), provided by the House Bill, Congress decided to treat conduct subject to Section 8 (b) (1) (A) exclusively as unfair labor practices, subject to the jurisdiction of the Board. It stated, however, that unions which engaged in such practices might also subject themselves to liability "under ordinary principles of law." With reference to the House provision which deprived employees who violated these provisions of rights under the Act, the report pointed out that this sanction was not specifically provided

but that "an employee who is discharged for participating in them will not * * * be entitled to reinstatement," since "participation in them * * * is not a protected activity under the Act" (*ibid.*). See also H. Conf. Rep. No. 510, 80th Cong., 1st Sess., pp. 58-59.

In addition, the legislative history of Section 7, and the report of the Conference Committee concerning it, make it clear that Congress believed that concerted activities which, although not violative of Section 8 (b) (1) or other subsections of Section 8 (b), the National Board would hold unprotected by Section 7 because of their "nature or objectives," could be adequately discouraged and prevented by reserving to the employer power to discharge employees for engaging in such activities. The House Bill proposed that Section 7 be amended to exclude from its protection activities constituting "unfair labor practices under Section 8 (b), unlawful concerted activities under Section 12, or violations of collective bargaining agreements." The Conference Committee rejected this proposal both on the ground that it was unnecessary in view of the National Board's practice of determining whether concerted activities are protected in the light of their nature and objectives, and because "such a provision might have a limiting effect and make improper conduct not specifically mentioned subject to the protection of the Act" (H. Conf. Rep. No. 510, 80th Cong., 1st Sess., pp.

38-39). The Conference Report noted that concerted activities which the Board found "undesirable" in the light of the objectives and policies of the Act as set forth in Section 1, "are not to have any protection under the Act," and emphasized, by reference to the amendment to Section 10 (c), that employers were empowered to put an end to such activity by discharging employees who engaged in it (*ibid.*, at p. 39). Again, in its discussion of "unlawful concerted activities," the Conference Report noted, p. 59, that employees "who engage in violence, mass picketing, unfair labor practices, contract violations, or other improper conduct, or who force the employer to violate the law, do not have any immunity under the Act and are subject to discharge without right of reinstatement. The right of the employer to discharge an employee for any such reason is protected in specific terms in Section 10 (c)."

We believe that the refusal of Congress to define as unfair labor practices all concerted activities which the Board might find unprotected by Section 7 because of their nature or objectives, coupled with the Conference Committee's emphasis upon the right of the employer to discharge for such activity, demonstrates both the intention of Congress that, unless such activities were made independently unlawful on grounds unrelated to labor relations, they were to be dealt

with solely through the employer's power of discipline, and its conviction that that power was adequate to put an end to such activities. We further believe that the careful choice of remedies selected by Congress for dealing with various unfair labor practices, and for conduct made unlawful or deemed undesirable by Congress—cease and desist, and other remedial orders issued by the Board pursuant to Section 10 (c), preliminary injunctive relief in certain cases under Sections 10 (j) and 10 (l), denial of access to Board facilities (Section 9 (f), (g) and (h)), loss of employee status (Section 8 (d)), temporary injunctions under Section 203, criminal actions under Section 302 and 304, civil suits for damages only under Section 303—no less than its decision after careful deliberation that only certain acts and practices were to be outlawed, makes it clear that both as to substance and as to remedy Congress covered the entire field of labor relations and regulated that field to the full extent to which it believed regulation desirable.

B. EXCEPT AS SPECIFICALLY STATED IN THE ACT AND IN THE LEGISLATIVE HISTORY, CONGRESS INTENDED TO EXCLUDE THE STATES FROM THE AREA DEALT WITH BY CONGRESS IN THE STATUTE

The language and legislative history of the Wagner Act indicated that Congress intended to exclude the states from the area of labor relations covered by that Act. Section 10 (a) of that Act, which provided that the power of the National

Board over unfair labor practices shall be "exclusive," was "intended to dispel the confusion resulting from dispersion of authority and to establish a single paramount administrative or quasi-judicial authority in connection with the development of Federal American law regarding collective bargaining." S. Rep. No. 573, 74th Cong., 1st Sess., p. 15. The Senate Committee pointed out that the centralization of exclusive power in the National Board was necessary because the Act embodied "a uniform national policy established by law of Congress. As such it must receive uniform interpretation everywhere" (*ibid.*, pp. 4-5). H. Rep. No. 1147, 74th Cong., 1st Sess., p. 9. Section 10 (a) and the comments of the Congressional Committees concerning it were directed, of course, at the diffusion of responsibility which had up to that point existed on the federal level, since prior to the passage of the National Act the states had not entered that field. It is unlikely, however, that Congress would have been inclined to open the door to intrusion by state authorities which it closed to intrusion by federal authorities. And, noting the potentials of conflict which would result from permitting the states to exercise jurisdiction over matters vested by Congress in the discretion of the National Board, this Court in *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U. S. 767, held that Congress intended to preclude the states from doing so. In *Rice v. Santa*

Fe Elevator Corp., 331 U. S. 218, 236, this Court pointed to the Wagner Act as an instance in which Congress acted "so unequivocally as to make clear that it intends no regulation except its own."

In enacting the amended Act Congress made it much more clear that it intended to preempt the entire field covered by the statute and prevent the states from exercising jurisdiction over labor relations affecting interstate commerce. The Report of the House Committee, H. Rep. No. 245 on H. R. 3020, 80th Cong., 1st Sess., pointed out that the House Bill retained the provision in Section 10 (a) which made the power of the National Board "exclusive." It said, p. 40, "The rule of exclusive jurisdiction was developed many years ago by the Supreme Court in order to provide for uniformity in matters of national policy under the commerce clause. The Labor Act is an illustration of such a policy." The House Committee also stated (p. 44), that "*by the Labor Act Congress preempts the field that the Act covers insofar as commerce within the meaning of the Act is concerned.*" (Italics supplied.)

Although the final version of Section 10 (a) of the amended Act does not contain the word "exclusive," the Report of the Conference Committee establishes that it was not eliminated because of any disagreement with the views of the House concerning the exclusion of state agencies from

the area covered by the Act, or because of any desire to modify the jurisdiction theretofore vested in the National Board, but rather because that term did not comport with other provisions embodied in the amended bill which vested jurisdiction in the federal district courts to grant injunctive relief in certain cases, and which made unions suable. See *Amazon Cotton Mill Co. v. Textile Workers Union*, 167 F.2d 183 (C. A. 4).²

Because Congress intended and expected that the effect of enacting the bill would be to exclude state regulation of all labor relations matters in industries affecting commerce unless Congress explicitly left certain of those matters to the states, Congress took care to leave to the states in clear-cut terms jurisdiction over those areas in

² H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 52; House Minority Report No. 245 on H. R. 20, 80th Cong., 1st Sess., p. 90. The following questions and answers prepared by Senator Taft were inserted in the Congressional Record, at 93 Cong. Rec. A-3370):

* "Question. Is it true generally that State laws take precedence over the provisions of the new Federal labor Act?

"Answer. Only where purely intrastate industries are affected. In interstate matters, except for the provisions with respect to compulsory membership agreements, the new act takes precedence over state acts which are in conflict with it."

* "Question. Will enactment of State legislation be necessary in any cases to amplify or strengthen provisions in the bill?

"Answer. No. State legislation will not be necessary unless the State desires to have legislation applying to purely intrastate industries. States may also pass laws completely prohibiting union shops if they desire to do so. (Italics added.)

which Congress intended that the States should be free to act. Thus, after extensive debate, and over objection that lack of uniformity was undesirable, Congress determined to leave to the states individually the power to deal with the union shop. 93 Cong. Rec. 3453-3454, 6519-6520, 6532. To accomplish this purpose Congress enacted Section 14 (b) which expressly reserves to the states power to prohibit the execution or application of agreements requiring membership in a labor organization as a condition of employment. See *Algoma Plywood Co. v. Wisconsin Employment Relations Board*, decided March 7, 1949, No. 216, this Term. The House Committee explained (H. Rep. No. 245, p. 40), that such a "special provision" was necessary "to give to the states a concurrent jurisdiction in respect of closed shop and other union security arrangements."

Similarly, when Congress desired to leave to the states power to mediate and conciliate labor disputes affecting commerce, Congress manifested its intention by explicitly recognizing such agencies in the statute and providing for cooperation between federal conciliation agencies and those of the states. See Section 202 (c) and Section 8 (d) (3).

In Section 10 (a) the 80th Congress dealt explicitly with the relationship between the National Board and state agencies in the area of

labor relations committed to the jurisdiction of the National Board. The problem, of course, had been highlighted for Congress by the decision of this Court in the *Bethlehem* case. Congress acted on the premise that, absent specific authorization, the states were entirely precluded from deciding cases or questions which the National Board was empowered to consider even though for budgetary reasons the National Board declined to exercise its jurisdiction in a particular case. It determined that in certain types of industries, and subject to specific conditions, the National Board should be empowered to authorize states' agencies to handle such cases. It stated, in the proviso to Section 10 (a):

* * * *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

It is significant to note, in the first place, that the section to which this proviso is attached

covers explicitly cases involving questions whether unfair labor practices have been committed, although it was undoubtedly intended to cover representation cases as well. Secondly, the National Board is precluded from ceding to any state agency jurisdiction over any case which involves a labor dispute "affecting commerce" if the case arises, *inter alia*, in a manufacturing industry which is not "predominantly local in character." Third, the National Board is altogether precluded from ceding jurisdiction where differences exist between the applicable state law and the National Act.³

³ The report of the Joint Committee on Labor Management Relations, 80th Cong., 2d Sess. (March, 1948), p. 31, discussed the effect of Section 10. (a) in practice as follows:

"The Board's experience in attempting to work out agreements with the State agencies has demonstrated that it will only be possible with a State which enacts a statute following the Federal pattern. The act requires a uniform national policy with respect to all industries whose operations substantially affect interstate commerce.

"The Board is now receiving a tremendous volume of cases. The desirability of permitting it to reduce this load of cases by ceding jurisdiction over borderline industry, businesses primarily local in nature whose operations only indirectly affect interstate commerce, appears obvious. However, if it can only be done by an amendment to the act which would permit inconsistent regulations and as many different policies as there are States having labor relations acts, the desirability appears questionable."

See also, National Labor Relations Board, Thirteenth Annual Report (Govt. Print. Off. (1949), p. 18).

These specific provisions permitting the states to act in certain circumstances demonstrate that Congress understood that otherwise the states would be powerless in the field.

C. THE NATIONAL BOARD IS EMPOWERED TO DECIDE WHETHER OR NOT THE WORK STOPPAGES HERE INVOLVED ARE CONCERTED ACTIVITIES PROTECTED BY SECTION 7, AND ALSO WHETHER THEY CONSTITUTE UNFAIR LABOR PRACTICES UNDER SECTION 8 (b)

(1) Defining the scope of the phrase "concerted activities for purposes of collective bargaining and other mutual aid or protection," as used in Section 7 of the National Act, is a function performed by the National Board in the course of its "usual administrative routine," precisely as it defines the scope of the phrase "unfair labor practice" as used in Section 8, and the term "employee" as used in Section 2 (3). *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U. S. 111, 130; *Republic Aviation Corp. v. National Labor Relations Board*, 324 U. S. 793, 798; *National Labor Relations Board v. E. C. Atkins & Co.*, 331 U. S. 398; *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 331 U. S. 416. That function must be performed by the Board in every case in which it is called upon to decide whether employer interference, restraint or coercion designed to curb particular work stoppages or other

concerted activities violates Section 8 (1) of the Act.

In amending the National Act Congress did not alter the objective which it initially sought to achieve by enactment of Section 7, i. e., equalization of the bargaining power of employees with that already possessed by employers. Congress sought to strengthen employee bargaining power "by encouraging the practice of collective bargaining and protecting the rights upon which it is based." (S. Rep. No. 573, 74th Cong., 1st Sess., p. 6.) The rights enumerated in Section 7 were regarded by Congress as "the basic rights incidental to the practice of collective bargaining." (S. Rep. No. 573, 74th Cong., 1st Sess., p. 8.)

That Congress regarded the right of employees to withhold their labor as a means of bringing economic pressure to bear upon employers as indispensable to collective bargaining is apparent not only from its inclusion of the right to engage in "concerted activities for purposes of collective bargaining" among the rights affirmatively guaranteed in Section 7, but also from its definition of the term "employee" in Section 2 (3), to include "any individual whose work has ceased as a consequence of, or in connection with any labor dispute." This definition was designed to insure that employees would not forfeit the protection of the Act "merely by collectively refraining from work during the course of a labor con-

troversy" (S. Rep. No. 573, 74th Cong., 1st Sess., p. 6). "To hold otherwise," the report continued, "would be to withdraw the Government from the field at the very point where the process of collective bargaining had reached a critical stage and where the general public interest had mounted to its highest point" (*ibid*).

Moreover, the legislative history shows that Congress relied upon collective bargaining and the right of employees to take effective collective action in aid thereof to play an "important role" in establishing a "floor for wages" (S. Rep. No. 573, 74th Cong., 1st Sess., pp. 18-19). To this end Congress took steps to insure the independence of employee organizations from employer domination (Section 8 (2)), to protect employees against discrimination based upon their exercise of the rights guaranteed in the Act (Section 8 (3)), and to prevent employer interference with their legitimate collective action in aid of collective bargaining (Section 8 (1)). That Congress deemed the collective withholding of labor foremost among such activities is evident also from the explicit proviso, Section 13, that "Nothing in this Act shall be construed so as to interfere with or impede or diminish the right to strike."

In the light of the text and objectives of the statute, and of its legislative history, the Board has construed the phrase "concerted activities for purposes of collective bargaining or other

mutual aid or protection" to include work stoppages in aid of collective bargaining and work stoppages designed to call attention to grievances. In *National Labor Relations Board v. Mackay Radio & Telegraph Company*, 304 U. S. 333, this Court affirmed the Board's finding that the activity of employees in engaging in an economic strike was protected by Section 7, and that an employer could not discriminate against employees for engaging in such activity. In *National Labor Relations Board v. Fansteel Corporation*, 306 U. S. 240, 256, this Court stated that under the Act "the exercise of pressure" upon an employer to achieve economic demands through the "mere quitting of work" is "recognized as lawful."

The Board has been required to consider whether temporary work stoppages, where the employees intend to return to work at a specific time whether or not their demands are met but without abandoning those demands, are activities protected by Section 7. In *Matter of American Manufacturing Company*, 5 N. L. R. B. 443, 457-459, enforced, 106 F. 2d 61, 68 (C. A. 2), affirmed, 309 U. S. 629, the Board held that a work stoppage planned to last two hours and designed as a protest against the employer's refusal to bargain with the Union, was activity protected by Section 7 of the Act. In *Matter of Cudahy Packing Company*, 29 N. L. R. B. 837, 864-868, where the

employees, protesting a proposed reduction in the work force, planned a series of temporary work stoppages to last 20 minutes in the morning in one department, to be followed immediately by a 20-minute stoppage in another department, and similar ten-minute stoppages in both departments to take place in the afternoon, the Board found that the activities were a "type of strike" and were protected by Section 7. In *Matter of Kennametal, Inc.*, 80 N. L. R. B. No. 233, the Board held that a work stoppage during working hours designed to induce the employer to meet with the employees and adjust their grievances was protected activity. In *National Labor Relations Board v. Clinton Woolen Mfg. Co.*, 141 F. 2d 753, 756, the Court of Appeals for the Sixth Circuit held that the action of the employees in stopping work in the middle of the workday and, in violation of the employer's orders, leaving the plant for the purpose of attending an organizational meeting was "in practical aspect, a strike," and was protected by Section 7. In *Matter of Harnishfeger Corp.*, 9 N. L. R. B. 676, 685-687, where, as a means of bringing pressure to bear upon the employer to induce him to sign a Union-approved "statement of policy," the Union embarked upon a program of temporary stoppages, instructing the members to work only 8 hours on a single shift, the Board found that the activity "was, in effect, a partial strike" and that Section

7 comprehended the right of employees to engage in such activity.

Likewise, the Board and the federal courts in reviewing its orders have had occasion to consider whether work stoppages are removed from the protection of Section 7 when they are not preceded by demands made upon the employer, or when the employer is not notified of the stoppages in advance. In *Matter of Spencer Auto Electric, Inc.*, 73 N. L. R. B. 1416, 1419-1421, where the employees engaged in a walkout in protest against the discriminatory discharge of a union leader, the Board held (73 N. L. R. B., at p. 1420), that "whether this conduct is called a strike, a walkout, or merely concerted activity, it was protected under the Act. Nor was this protection lost because of [the employees'] failure to give the respondent advance notice of their demand for Harte's reinstatement." In support of this holding the Board cited, 73 N. L. R. B., at p. 1420, note 11, the decision of the Court of Appeals for the Fourth Circuit in *Home Beneficial Life Insurance Co. v. National Labor Relations Board*, 159 F. 2d 280, certiorari denied, 332 U. S. 758, which, with respect to one group of employees, held that a strike does not lose its protected status under Section 7 of the Act though the employees do not notify the employer even after the event that a strike is in progress. In *National Labor Relations Board v. Kalamazoo Stationery Co.*, 160 F. 2d 465 (C. A. 6), certiorari denied, 332

U. S. 762, the Court of Appeals for the Sixth Circuit held that a spontaneous walk-out preceded neither by demands made upon the employer nor by notice that a work stoppage would occur, was a "strike" protected by Section 7. So too, in the *Harnishfeger* case, 9 N. L. R. B. 676, 685, and in the *Cudahy Packing* case, 29 N. L. R. B. 837, 865, 867, the stoppages were held protected despite the fact that the employer was not notified in advance, and the fact, in the *Cudahy* case, that the employer was not even advised of the reason for the stoppages until after he inquired.

Of course, neither the Board nor the federal courts hold all work stoppages protected regardless of their nature or objectives. The Board believes (see paragraph quoted in slip opinion pp. 9-10 from, *Matter of Harnishfeger Corp.*, 9 N. L. R. B. 676, 685-687), that the statute vests in it discretion to consider all the circumstances, including methods and objectives, in determining whether particular concerted activities are protected by Section 7. As the Report of the Conference Committee quoted in this Court's opinion (slip opinion pp. 14-15) pointed out, both the Board and the federal courts in reviewing its determinations hold that work stoppages for purposes antithetical to the objectives of the statute, or for purposes which Congress may not be presumed to have intended to sanction, are not protected by Section 7. See, e. g., *National Labor Relations Board v. Draper Corp.*, 145 F. 2d 199

(C. A. 4); *National Labor Relations Board v. Indiana Desk Co.*, 149 F. 2d 987 (C. A. 7); cf. *National Labor Relations Board v. Condenser Corp.*, 128 F. 2d 67 (C. A. 3).

In *Matter of Underwood Machinery Co.*, 74 N. L. R. B. 641, 647, the National Board indicated its concern with the method of concerted activities used to achieve proper objectives. It said: "A slow-down in a plant working on a high priority war contract is not a type of concerted activity which should be protected against reasonable disciplinary action." And the federal courts have held that work stoppages which were not undertaken for the purpose of inducing an employer to agree to change working conditions, but which merely reflected unilateral establishment of working conditions by the employees, were not concerted activities protected by Section 7. This is the holding of *G. C. Conn, Ltd., v. National Labor Relations Board*, 108 F. 2d 390 (C. A. 7), and *Home Beneficial Life Ins. Co. v. National Labor Relations Board*, 159 F. 2d 280 (C. A. 4), certiorari denied, 332 U. S. 758. In both cases the employees used the work stoppage, not as a means of bringing economic pressure to bear upon an employer to induce him to consent to a change in working conditions, but as a means of unilaterally altering, despite the employer's refusal to consent, the hours and conditions of their employment. The dispute in the *Conn* case related to premium pay for overtime work, the

employees taking the position that no overtime should be worked without such pay. When the employer refused to agree to their demand they proceeded to put their proposal into effect unilaterally, by refusing to work overtime. It was in this context that the court held (108 F. 2d, at p. 397) that nothing in the Act "gives the employee the right to work upon terms prescribed solely by him," which, said the court, "is plainly what was sought to be done in this instance. It is not a situation in which employees ceased work in protest against conditions imposed by the employer, but one in which the employees sought and intended to continue work upon their own notion of the terms which should prevail. If they had a right to fix the hours of their employment, it would follow that a similar right existed by which they could prescribe all conditions and regulations affecting their employment." The language of the court's opinion, read in the light of the facts in that case, indicates that the court held only that Section 7 does not confer upon employees the right unilaterally to establish working conditions, and that the Act does not protect employees in doing so when their conduct takes the form of refusing to work, any more, for example, than it would protect them in working overtime contrary to the employer's orders.

The *Home Beneficial* case goes no further. There the employees put into effect, despite the

employer's refusal to agree, their demand that they not be required to report to the Company's office each morning before undertaking to service their customers. In holding the action of the employees in refusing to report unprotected by Section 7, the court quoted from the opinion in the *Conn* case.

The question whether twenty-seven temporary work stoppages, such as those here involved, designed to bring economic pressure to bear upon an employer in aid of collective bargaining (R. 19, 20, 21, 107), are concerted activities essential to maintenance of the "balance of forces" between employees and employers which Congress "thought it necessary to create" (*National Labor Relations Board v. Hearst Publications, Inc.*, 322 U. S. 111, 128) and therefore protected by Section 7, has never been passed upon by the National Board or the federal courts in reviewing its determinations.¹ The Board, prior to this Court's opinion, did not regard itself as precluded by the *Conn* and *Home Beneficial* cases from finding such activities to be protected. On the other

¹ The General Counsel has, however, dismissed charges filed by a union alleging that an employer's shut-down of a plant constituted an illegal lock-out of the employees where the lock-out resulted from a series of 23 work stoppages in support of the Union's demands during bargaining, stoppages which made it uneconomical or inconvenient for the employer to continue operations. *Matter of B. F. Goodrich Co.*, National Labor Relations Board Case No. 9 CA 80 (Appeal to General Counsel).

hand, it does not believe that its own prior decisions require that protection be extended to this form of concerted activities. Thus, insofar as the Board is concerned—and apart from this Court's decision in this case—the question is an open one. The Board does believe, however, as we shall argue, *infra*, pp. 32-48, that the statutory scheme established by Congress for administration of the Act requires that it, rather than state agencies, should consider and decide whether, as a matter of sound labor-relations policy, such activities should be sanctioned.

(2) The Board is empowered to consider the status under federal law of the activities here involved in yet another context. Although it is true that Congress did not denominate as unfair labor practices all forms of concerted activities or work stoppages which the Board found unprotected by Section 7 (see pp. 8-12, *supra*), and thereby authorize the Board to issue orders bringing such activities to an end (See *Matter of National Maritime Union of America (C. I. O.) et al.*, and *Texas Co.*, 78 N. L. R. B., No. 137), Congress did in Section 8 (b) (1) (A) authorize the Board to treat as unfair labor practices concerted activities which, because of their method, restrain or coerce employees in the exercise of rights guaranteed by Section 7, among them the right to continue to work and not participate in union activity. *Matter of International Long-*

shoremen's & Warehousemen's Union (C. I. O.), Local 6, et al., and Sunset Line & Twine Co., 79 N. L. R. B., No. 270; *Matter of United Furniture Workers of America, Local 309 (C. I. O.), et al., and Smith Cabinet Mfg. Co., Inc.*, 81 N. L. R. B., No. 138. This Court in its opinion, pp. 6-7, 16-17, apparently overlooked this provision of the amended Act, for its conclusion that the Act as amended gives the Board no power to forbid a strike "because its method is illegal—even if the illegality were to consist of actual threatened violence to persons or destruction of property" (slip op., p. 7), rests solely upon reference to Section 8 (b) (4) and does not consider the power which is vested in the Board by Section 8 (b) (1). The Board has not as yet had occasion to decide whether work stoppages of a type which it deems unprotected by Section 7 of the Act because it regards the method employed as unjustifiable (see, e. g., *Matter of Underwood Machinery Co.*, 74 N. L. R. B. 641), may properly be regarded as "restraint and coercion" of non-participating employees pursuant to Section 8 (b) (1). (But cf. *Matter of Perry Norvell Co. and United Shoe Workers of America (C. I. O.), et al.*, 80 N. L. R. B., No. 47). But certainly the Board regards itself as empowered by the statute to "entertain a proceeding" in which it is charged that a work stoppage, by virtue of its method alone, is violative of Section 8 (b) (1).

of the amended Act. We cannot believe that this Court intended to indicate that the Board was foreclosed from investigating such a charge and deciding whether, properly construed, Section 8 (b) (1) renders activities such as those here involved unlawful.

Moreover, since these stoppages occurred while the union was exclusive bargaining agent, and was hence under a duty to bargain collectively with the employer (Section 8 (b) (3)), the Board would be empowered to consider a charge that this series of concerted work stoppages violated Section 8 (b) (3) by virtue of the fact, as found by this Court (slip op., p. 3),⁵ that "the employer was not informed during this period of any specific demands which these tactics were designed to enforce nor what concessions it could make to avoid them."

The Board therefore, takes the view that it is authorized to "deal with" the activities here involved in various ways. First, it is authorized to determine, both under the original Act, and under the Act as amended,⁶ whether these activities are protected by Section 7, and if it finds that they are, to "approve * * * the union conduct in question" (slip op., p. 7), and enjoin employer interference therewith. Secondly, it is empowered to determine, under the amended Act,

⁵ The Petition for Rehearing (pp. 1-6) questions the accuracy of this factual conclusion.

whether these activities are outlawed by Section 8 (b) (1) or Section 8 (b) (3), and if it finds that they are, to "forbid * — * the union conduct in question" (*ibid.*). In any event, it is clearly empowered by both the original and the amended Act "to investigate" fully the activities involved preliminary to deciding any or all of these questions. And, of course, should the Board decide that these activities are violative of Section 8 (b) (1) or 8 (b) (3), it would be empowered to issue an order requiring the union to cease and desist from such conduct, thereby applying to these activities the very same sanction applied by Wisconsin in this case.

D. THE SCHEME AND STRUCTURE OF THE ACT, AS WELL AS THE INTENTION OF CONGRESS, REQUIRE THAT THE STATES BE PRECLUDED FROM DECIDING QUESTIONS OF LABOR RELATIONS AFFECTING INTER-STATE COMMERCE WHICH ARE COMMITTED TO THE DISCRETION OF THE NATIONAL BOARD SUBJECT TO REVIEW BY THE FEDERAL COURTS

As we have indicated above, *supra*, pp. 12-14, 16-18, Congress created the National Board for the purpose of centralizing in a single expert agency the responsibility and obligation of construing and applying in the first instance the provisions of the federal act in the field of labor relations. The action of Congress represented its deliberate judgment that in these matters uniformity on a nation-wide scale was indispensable to sound and equitable administration of a policy

which vitally affected the economy of the Nation and which Congress desired to apply "so far as its power could reach." *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U. S. 111, 125. That policy requires that all questions which can arise under the National Act be decided in the first instance only by the National Board.

In *Republic Aviation Corp. v. National Labor Relations Board*, 324 U. S. 793, 798, this Court pointed out that Congress "did not undertake the impossible task of specifying in precise and unmistakable language each incident which would constitute an unfair labor practice. On the contrary, the Act left to the Board the work of applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms."

Cf. S. Rep. No., 573, 74th Cong., 1st Sess., p. 10. In *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U. S. 111, 130, this Court pointed out that Congress had not comprehensively defined the term "employee," although the very coverage of the Act depended upon that term. The Court said, "That task has been assigned primarily to the agency created by Congress to administer the Act. Determination of 'where all the conditions of the relation require protection' involves inquiries for the Board charged with this duty. Everyday experience in the administration of the statute gives it

familiarity with the circumstances and backgrounds of employment relationships in various industries, with the abilities and needs of the workers for self-organization and collective action, and with the adaptability of collective bargaining for the peaceful settlement of their disputes with their employers. The experience thus acquired must be brought frequently to bear on the question who is an employee under the Act. Resolving that question, like determining whether unfair labor practices have been committed, 'belongs to the usual administrative routine' of the Board." Accord, *National Labor Relations Board v. E. C. Atkins & Co.*, 331 U. S. 398; *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 331 U. S. 416.

Defining the scope of the phrase "concerted activities for purposes of collective bargaining or other mutual aid or protection," is indispensable to the Board's task of defining the scope of unfair labor practices under Section 8 (1), and Congress must necessarily have intended, as the Committee Reports on the amended Act disclose that it did intend (*supra*, p. 10); to vest that function, to the same extent as the issues involved in the cases cited, exclusively in the Board in the first instance. Otherwise, uniform interpretation and application of the National Act would be impaired at the very outset.

The pattern established by Congress for judicial review of determinations by the National Board further establishes that Congress intended that all questions which could arise under the National Act be decided first by the National Board. Limited power to review orders of the National Board was vested exclusively in the federal courts of appeals, and this Court's certiorari jurisdiction was extended to such cases (Sections 10 (e) and (f)). Giving effect to the "division of responsibility" between the National Board and the federal courts "which Congress as a matter of policy" embodied in the statute (*National Labor Relations Board v. Waterman Steamship Co.*, 309 U. S. 206, 209), this Court held that in reviewing Board decisions which are based upon construction of terms or phrases which appear in the Act the court's function is limited to deciding whether the Board's judgment has "warrant in the record" and a "reasonable basis in law." *Hearst case, supra*, 322 U. S., at p. 131; *Republic Aviation Corp. v. National Labor Relations Board*, 324 U. S. 793, 803; *Medo Photo Supply Corp. v. National Labor Relations Board*, 321 U. S. 678, 681-682, note 1. The statutory provisions authorizing ultimate determination by the Federal courts of questions of construction of the National Act contemplate that they will decide such questions only upon review of orders of the National Board. Clearly, determination of such

questions by the federal courts either themselves in the first instance, or in the course of reviewing determinations of state tribunals, is incompatible with the scheme established by Congress.

As we shall now show, authorizing the states to determine whether particular forms of work stoppages are justifiable activities in aid of collective bargaining, determinations which the National Board is empowered to make in construing Section 7 of the National Act, leads not only to variant and divergent application of the National Act in the forty-eight states, but to atrophy of the National Board's jurisdiction to consider and decide questions under the National Act. It results, in addition, as this case shows, in transferring from the National Board to this Court the function of deciding in the first instance questions which Congress committed to the primary jurisdiction of the National Board.

1. *Preservation of the National Board's power to determine whether particular types of concerted activities are or are not protected by Section 7 requires that the states be precluded from enjoining activities merely because they do not comport with local labor-relations policies.*—In the first place, to permit the states to enjoin work stoppages which, as a matter of local labor-relations policy, they deem unjustified, may well result in preventing the National Board from having any opportunity to consider whether the

particular work stoppages are or are not protected by Section 7 of the National Act. If the state makes an injunctive remedy available to the employer, the employer may resort to it, instead of imposing discipline, to curb work stoppages which he believes unjustified. Since the sanctions of the National Act are directed not against the states but only against employers (and labor unions), the employees, in that event, would be powerless to complain to the National Board that they were being denied by the injunction rights guaranteed them by Section 7 of the National Act. The National Board would be prevented, by the employer's failure to invoke his disciplinary powers, from deciding whether or not the work stoppages enjoined by the State were concerted activities protected by Section 7.

The possibility that the state and the National Board may arrive at different conclusions concerning the propriety of the employee activity, as a result of each applying a "different or conflicting theory," moreover, gives rise to the "very real potentials of conflict" which led this Court "to allow supremacy to the federal scheme" in *La Crosse Telephone Corp. v. Wisconsin Employment Relations Board*, 336 U. S. 18, 26. For, just as the employees in that case could "shop around" between the state and the federal Board for the one apt to give them the most favorable treatment, so here the employer could choose between

imposing discipline and seeking injunctive relief from the state in terms of which Board would be the more likely to view his claim with favor.

2. *Allowing the states concurrent power with the National Board to decide whether particular forms of work stoppages in aid of collective bargaining are permissible introduces local variations into the application of federal policy contrary to the intention of Congress.*—To permit the several states to determine, pursuant to their own local labor relations concepts whether particular work stoppages in aid of collective bargaining are justifiable is to invite divergent treatment by the states of a problem which, insofar as interstate industry was affected, Congress desired to treat uniformly under federal law. As we have shown, the National Board is clearly empowered to decide whether particular forms of work stoppages are within the protection of Section 7. If the Board finds the activities protected it thereby upholds the right of employees to participate in them as a matter of federal law. If it holds them not protected it thereby, as a matter of federal law, authorizes employers to prevent such activity by disciplinary action. State intrusion either to authorize or to prevent the activities necessarily upsets uniform application of the federal rule. For example, some states may conclude that particular types of concerted activities which the National Board holds un-

protected, either because of their method or purpose, are justifiable, and may seek to shelter employees who engage in such activity from discharge or other disciplinary action by the employer. (Cf. *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U. S. 767, 775.)

Immunity of employees from disciplinary action resulting from participation in concerted activities would then depend not, as Congress intended, upon the National Board's determination whether the activities are protected by national law, but upon the determination of the particular state in which the activities occurred. So too, some states may hold that particular types of concerted activities which the National Board deems protected are unjustifiable; and, therefore, seek to punish or enjoin the activity. The exercise of rights created by Congress as a matter of federal law would then depend not on the holdings and determination of the National Board, but upon the varying views of the states. To permit the states to act at all in this field would lead inevitably, at least in some states, to the kind of conflict between federal and state policy which these illustrations suggest.

We think it clear, moreover, that Congress did not intend that the National Board's determination as to whether particular forms of concerted activities are protected by Section 7, should be dependent upon, or vary with, the views of the

several states (see pp. 12-15, 16-19, 32, *supra*, pp. 52-57, *infra*). Such a result would "introduce variations into the statute's operation as wide as the differences the forty-eight states" may ultimately produce in the process of deciding questions such as that which the Wisconsin Board has decided here. *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U. S. 111, 123. But "Both the terms and the purposes of the statute, as well as the legislative history, show that Congress had in mind no such patchwork plan * * *. The Wagner Act is federal legislation, administered by a national agency, intended to solve a national problem on a national scale. It is an Act, therefore, in reference to which it is not only proper but necessary for us to assume, 'in the absence of a plain indication to the contrary, that Congress * * * is not making the application of the federal act dependent on state law.' *Jerome v. United States*, 318 U. S. 101, 104. Nothing in the statute's background, history, terms or purposes indicate its scope is to be limited by such varying local conceptions, either statutory or judicial, or that it is to be administered in accordance with whatever different standards the respective states may see fit to adopt * * *." *Ibid.*

The same considerations which led this Court in the *Hearst* case to find that Congress did not intend to make the term "employee" in Section

2 (3) of the federal Act depend on definitions contained in state law, militate against finding that Congress intended to make the phrase "concerted activities for purposes of collective bargaining or other mutual aid or protection" depend on definitions made by state boards or courts. In neither case did Congress intend to "refer decision of the question outright to the local law." *Hearst* case, *supra*, 322 U. S. at p. 126.

If we are correct in assuming that Congress did not intend that the National Board's determination whether particular concerted activities are protected by Section 7 should depend upon and vary with the labor-relations policies of the several states, we believe that the same considerations which led this Court in the *Bethlehem Steel* case, 330 U. S. 767, and in *La Crosse Telephone Corp. v. Wisconsin Employment Relations Board*, 336 U. S. 18, to preclude the states from exercising concurrently with the National Board "a discretionary control over the same subject matter," require that the states be precluded from deciding whether particular concerted activities, because of their method or purpose, are justifiable from the point of view of labor-relations policy. If state boards and the National Board are both authorized to make this judgment "They might come out with the same determination, or they might come out with conflicting ones * * * But the power to decide a

matter can hardly be made dependent on the way it is decided. As said by Mr. Justice Holmes for the Court, 'When Congress has taken the particular subject-matter in hand coincidence is as ineffective as opposition * * *.' * * *

If the two boards attempt to exercise a concurrent jurisdiction * * *, action by one necessarily denies the discretion of the other. The second to act either must follow the first, which would make its action useless and vain, or depart from it, which would produce a mischievous conflict." *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U. S. 767, 775-776.

As stated in the *Bethlehem* case, *supra*, "The federal board has jurisdiction of the industry in which these particular employers are engaged and has asserted control over their labor relations in general." In that case the National Board asserted its power to decide "whether these foremen may constitute themselves a bargaining unit." Here it asserts its power to decide both whether these concerted activities are protected by Section 7, and whether they are unfair labor practices as defined in Section 8 (b). In the *Bethlehem* case, *supra*, this Court said that the National Board's proper assertion of jurisdiction to decide a question does not "leave room for the operation of the state authority asserted." A similar result, we believe, is required in this case.

We do not think that room ~~for~~ the exertion of state authority in this class of cases may be

implied from the fact that if the National Board should ultimately decide that the particular activities here involved are neither protected by Section 7, nor made unfair labor practices by Section 8 (b), it would not be authorized to enjoin the activities, as Wisconsin has done. As we have shown, *supra*, pp. 8-11, Congress deliberately refrained from making all concerted activities which the Board might find unprotected, unfair labor practices. Its judgment in that respect is not subject to reversal by those of the states which deem its decision in this regard unwise.

As we have shown, the Committee reports on the amended Act stressed the existence of the employer's power of discipline as a means of eliminating those practices by labor organizations which Congress or the National Board deemed unjustified. Congress considered the exercise of the employer's powers of discipline in such circumstances an affirmative part of its national labor policy. Indeed, after extensive debate, Congress rejected the proposal that employers be permitted to obtain injunctive relief, except through the National Board, even against unfair labor practices. See legislative history collected in *Amazon Cotton Mill Company v. Textile Workers Union*, 167 F. 2d 183 (C. A. 4); *Amalgamated Association, etc. v. Dixie Motor Coach Co.*, 170 F. 2d 902 (C. A. 8). The refusal of Congress

to permit employers to obtain injunctive relief directly against any types of unfair labor practices, even in cases where employers were permitted to seek relief by way of damages (Section 303), shows that Congress was deliberately withholding from employers power to obtain such relief from other agencies than the National Board, relief which the State is here according. And where Congress did not provide for injunctive relief against unprotected concerted activities, even through the National Board, it is clear that its decision resulted from a deliberate judgment that the disciplinary power of employers was adequate to cope with such activities.

Here Wisconsin has attempted to apply its own contrary judgment, that work stoppages which the National Board might find not protected should not only be subject to curtailment by the employer through the exercise of his disciplinary powers (R. 20), but should also be enjoined. But to permit the states to put such a judgment into effect not only nullifies the contrary conclusion of Congress, but necessarily authorizes the states to inject themselves into the solution of questions which Congress left exclusively to the National Board and the federal courts. Thus, Wisconsin has here decided, preliminary to affording injunctive relief, that all work stoppages which do not amount to strikes as defined by state law, are unjustified. But this is precisely the type of question which the Na-

tional Board is authorized to consider and decide in construing Section 7; and Section 10 (a) of the Act, as amended, demonstrates that Congress intended to preclude the states from deciding such questions unless the National Board cedes to the states its own jurisdiction to do so. Certainly, the National Board would not cede jurisdiction to Wisconsin to decide whether the work stoppages involved in the instant case are or are not protected by Section 7, since the National Board has itself never decided that question. The National Board could therefore not ascertain, as it is required to by Section 10 (a), prior to ceding jurisdiction, whether the policy, which Wisconsin sought to apply here conforms to national policy.

Moreover, the National Board could not, in any event, cede to Wisconsin under Section 10 (a) jurisdiction to decide under state law whether the work stoppages here involved are a legitimate form of concerted activities, since the question arises out of relations between an employer and employees engaged in the manufacturing industry, whose operations are not "predominantly local in character."

Finally, assuming that the result which Wisconsin would reach in this particular case is the same as that which the National Board would reach, the National Board could not cede jurisdiction to Wisconsin because the provisions of

the Wisconsin Act dealing with this matter are inconsistent with, and have received a construction inconsistent with, the National Act, see pp. 56-57, *infra*.

3. *Preservation of the "division of responsibility" between the National Board and the federal courts in administration of the National Act requires that the states be precluded from passing upon questions which the federal courts are empowered to consider upon review of orders of the National Board.*—Permitting the states to decide questions which are within the province of the National Board leads inevitably, as this case shows, to the shifting from the National Board to this Court of the function of deciding, in the first instance, whether particular concerted activities are protected by Section 7 of the National Act. This Court decided, in a case to which the National Board was not even a party, where it had entered no findings of fact, made no conclusions of law, and where it had never even had an opportunity to consider whether the activities were of a type protected by Section 7 of the National Act, that work stoppages of a particular character are not protected by Section 7. That is precisely the kind of question, which, under the scheme of the National Act, this Court would consider only upon review of an order of the National Board, based upon findings of fact and conclusions of law, findings which this Court would sustain if "supported by substantial evi-

dence" and conclusions which it would sustain if they had "a reasonable basis in law." Indeed, if the National Board had not fully explained the reasoning which led to its legal conclusion, this Court would presumably refrain, on that ground, from deciding the case at all. *Securities & Exchange Commission v. Chenery Corp.*, 318 U. S. 80; *Eastern Central Ass'n v. United States*, 321 U. S. 194; cf. *Republic Aviation Corp. v. National Labor Relations Board*, 324 U. S. 793, 803.

Yet, in this case, which arose because Wisconsin made a determination which the National Board is authorized to make, this Court considered and decided the question of federal law without having the views of the National Board before it. Although that decision did not result, as the federal act contemplates, from review by this Court of a decision of the National Board in which its "experience" and "familiarity with the subject matter" were brought to bear upon the problem (*Hearst case, supra*), the National Board is bound in future cases to hold that activities such as these are not protected by Section 7.^e

^e There are presently on file in the Thirteenth Regional Office of the National Board charges filed by the union involved in this case on May 11, 1948, alleging, *inter alia*, that the employer, Briggs-Stratton Corp., Milwaukee, Wisconsin, has violated Sections 8 (a) (1) and 8 (a) (3) of the National Act by imposing disciplinary penalties upon employees for engaging in a series of work stoppages similar to those considered by the Court in this case. These stoppages occurred after the Circuit Court of Milwaukee County set aside the order of the Wisconsin Board. The employer resorted to dis-

The consequence of permitting the states to make their own determinations in the field covered by the Act is not only to encroach upon the exclusive jurisdiction vested by Congress in the National Board, but also to open an alternate avenue to judicial interpretation of the National Act, which may not only coexist with, but supersede the method provided by Congress.

E. THE ALLEN-BRADLEY CASE AND SIMILAR DECISIONS OF THIS COURT DO NOT IMPLY THAT THE STATES ARE FREE TO EXERCISE CONCURRENT JURISDICTION WITH THE NATIONAL BOARD IN THE FIELD OF LABOR RELATIONS

1. *The states are free to deal with conduct by employees and employers in the course of labor disputes affecting interstate commerce only on grounds independent of, and apart from, labor-relations policy.*—The Court in its opinion holds that Wisconsin is empowered to enjoin the concerted activities here involved under the rule announced in *Allen-Bradley Local v. Wisconsin Employment Relations Board*, 315 U. S. 740. We had not hitherto understood that case as holding

disciplinary measures to curb the stoppages, thereby permitting the question to come before the National Board. While this Court's decision stands, the Board is precluded from investigating these charges, issuing a complaint and after full hearing, in the exercise of its discretion, deciding whether the stoppages are concerted activities protected by Section 7, and the alleged disciplinary penalties, if proven, in violation of Section 8 (a) (1) and 8 (a) (3) of the Act.

more than that fraud, violence, threats, and similar conduct are not placed beyond the reach of the states' police power by the National Act, even though such fraud, violence, or other tortious conduct occurs in the course of employee concerted activities in aid of collective bargaining. These matters were held reachable under the states' police power not only because Congress in the original Act clearly left such matters to the states, but because state control was not predicated upon local labor-relations policy but upon the traditional power of the states to preserve the peace, a subject not dealt with in the National Act at all. Indeed, as we read it, the Court's opinion expressly rejected the view that the states could deal with even these matters in terms of labor-relations policy since it said that the states could not seek to remedy such conduct by affecting "the status of employees" or causing "a forfeiture of collective bargaining rights." 315 U. S. at p. 751. Cf. *Hill v. Florida*, 325 U. S. 538, 543.

Under the amended Act, as we have shown, Congress dealt even with such employee misconduct as that involved in the *Allen-Bradley* case as a matter of national labor-relations policy. Clearly, it intended to permit no state labor-relations regulation of these matters other than its own (see pp. 12-19, *supra*.) This does not mean, of course, that Congress precluded the states from dealing with such matters on other grounds, e. g.,

to prevent breaches of the peace. It does mean that insofar as employee misconduct connected with concerted activities could be handled as labor-relations problems Congress itself undertook such regulation, and having done so, left no room for duplication of this function by the states.

The decisions of this Court in *National Labor Relations Board v. Fansteel Corp.*, 306 U. S. 240, and *National Labor Relations Board v. Sands Mfg. Co.*, 306 U. S. 332, are consistent with this approach. The *Fansteel* case held that the "illegal seizure" of the employer's property by "acts of force and violence", even though committed in the course of a strike, was independently illegal conduct of a kind which disqualified employees from the protection of the Act. 306 U. S. at p. 256. The Court did not indicate that the states were free to judge the propriety of such conduct in terms of whether it upset a desirable "balance of forces" between employer and employees in an economic contest over wages, hours, and working conditions. It held, rather, that conduct of this character, which was unquestionably tortious regardless of the employer-employee relation, could not be deemed protected by the National Act.

The *Sands* case, likewise, held that "The Act does not prohibit an effective discharge for repudiation by the employee of his agreement, any more than it prohibits such discharge for a

tort committed against the employer," 306 U. S. 332, 344. The illegal act of the employees—breach of contract—which rendered them amenable to discharge by the employer (or to punishment by the state) was here again a "ground aside" from labor relations policies. Indeed, as the Court's opinion shows, the facts that the action involved was refusal to work, that it was engaged in by employees acting in concert, and that it was designed to bring economic pressure to bear upon the employer were all irrelevant to the justification for the discharge. An individual employee, acting alone, who broke his employment contract for any reason would, as the Court stated, be subject to discharge by the employer (as well as to remedial state action). The fact that the breach of contract, like the forcible seizure of property in *Fansteel*, occurred in the course of concerted action designed to achieve changes in working conditions did not itself, of course, immunize the independently unlawful act from state control.

It is of interest to note that in the amended Act Congress considered and rejected a proposal that all breaches of collective-bargaining contracts should be dealt with as labor-relations

⁷ *Southern Steamship Co. v. National Labor Relations Board*, 316 U. S. 31, involved no question concerning federal-state powers in the field of labor relations. The question was the impact of one federal law upon another.

matters. S. 1126, as reported, 80th Cong., 1st Sess., Sections 8 (a) 6 and 8 (b) 5; S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess., pp. 20-21, 23; H. Conf. Rep. No. 510, 80th Cong., 1st Sess., pp. 41-42. Cf. Section 8 (d) of the Act, as amended. It decided that, unlike concomitants of labor disputes such as fraud and violence, enforcement of collective-bargaining agreements, as such, should be left to the courts to handle pursuant to general rules of contract law.

In sum, we believe that in the original Act, and certainly in the Act, as amended, Congress left the states free to deal with matters arising out of employee self-organization for purposes of collective bargaining, including work stoppages, when they affected interstate commerce, only on grounds independent of labor-relations policy. A contrary view would permit the states, if their labor-relations policies happened to coincide with those of the federal government, to duplicate the work of the National Board. It would also permit the states, if their policies happened to conflict with those of the federal government, to "impair, dilute, qualify, * * * and subtract from" rights guaranteed employees, employers, and labor organizations under the National Act. This would be particularly true, as we shall now demonstrate, if the states are free to determine on the basis of local labor-relations policies whether particular types of work stoppages in aid of

collective bargaining are proper and justifiable.

2. *If the states were permitted to judge the propriety of work stoppages in aid of collective bargaining in terms of local labor-relations policy, rights guaranteed by the federal Act would be subject to impairment by the states.* As we have indicated above, Congress in Section 7 of the National Act guaranteed to employees the right to stop work as a means of bringing economic pressure to bear upon employers in support of lawful demands because Congress considered this weapon indispensable to the equalization of employee bargaining power with that of employers, and because it believed that without that right the system of collective bargaining which it envisioned could not exist (pp. 20-22, *supra*). The opinion of the court in this case (p. 11), suggests, however, that the states are free to substitute their own judgments in this matter for that of Congress, provided that the states do not predicate illegalization of work stoppages upon the "conspiracy" doctrine. The Board believes that in the light of the objectives of the statute and its legislative history such a rule fails to give full effect to the purposes and objectives of Congress.

Under that rule the states would be empowered, for example, to prohibit strikes for higher wages, shorter hours, or the adjustment of legitimate grievances, on the theory that such strikes unduly

interfered with the employer's discretion in the operation of his business. But the National Act, was predicated on the theory that the right to strike for these and similar objectives was basic to the statutory scheme of promoting collective bargaining, and that such strikes therefore could not be considered arbitrary restraints upon the employer's right to operate his business. *Supra*, pp. 20-22. State prohibition of all strikes would thus substitute for the judgment of Congress that strikes in aid of collective bargaining must be permitted in order to effectuate national objectives, the state's notion that strikes must be prohibited to conform to local objectives.

The Board does not believe that the failure of Congress in the Wagner Act (compare Section 8 (b) (1) and (3) of the Taft-Hartley Act, *supra*, pp. 7-8, 29-31) to impose restrictions upon the method whereby employees engaged in work stoppages in aid of collective bargaining indicates that Congress was indifferent to restrictions upon method which the states might impose. Just as the action of Congress in imposing no conditions upon the freedom of choice of bargaining agents was deemed in *Hill v. Florida*, 325 U. S., at p. 541, to require the conclusion that Congress intended to preclude the state from so doing, so the action of Congress in conferring upon employees the right to engage in concerted activities for purposes of collective bargaining and other mutual aid and protec-

tion, subject only, as the legislative history shows (*supra*, pp. 7-8), to the power of the state to regulate independently unlawful acts customarily handled by state police courts, compels the conclusion that Congress intended to preclude the state from restricting in any other manner the forms which concerted activity for purposes protected by the National Act may take. To permit the states in their discretion to limit or restrict the manner in which employees withdraw their labor in aid of collective bargaining would be to permit them to restrict forms of concerted activity which the National Board and the federal courts regard as essential if the "balance of forces" created by Congress in the Act is to be maintained.

As we have observed, *supra*, pp. 8-9, Congress, in amending the Act rejected a House proposal to withdraw from the protection of Section 7 strikes not preceded by a poll of the employees concerned and authorized by a majority of those voting. Congress thereby reaffirmed the rule previously applied by the Board and the federal courts that Section 7 protects strikes by a minority as well as by a majority of the employees, including, of course, strikes which are not preceded by a secret ballot among employees. See, e. g., *National Labor Relations Board v. Kalamazoo Stationery Co.*, 160 F. 2d 465 (C. A. 6), certiorari denied 332 U. S. 762; *National Labor Relations Board*

v. *Draper Corp.*, 145 F. 2d 199, 205 (C. A. 4); see also cases cited, pp. 22-25, *supra*. Are the states empowered to reverse this Congressional judgment and to require as a matter of state law that strikes be preceded by a majority vote of the employees? Are states empowered to enjoin strikes affecting interstate industry which do not conform to such provisions?

Moreover, because "The Federal Act does not require the giving of notice of a pending dispute followed by a cooling-off period," the Court of Appeals for the Sixth Circuit held, relying on *Hill v. Florida, supra*, that a Michigan statute requiring notice and observance of a cooling-off period and making strikes in violation thereof unlawful could not constitutionally be applied to an industry subject to the Federal Act. *National Labor Relations Board v. Kalamazoo Stationery Company*, 160 F. 2d 465, 471 (C. A. 6), certiorari denied, 332 U. S. 762. Circuit Judge Clark, dissenting in *Southern Steamship Co. v. National Labor Relations Board*, 120 F. 2d 505, 512-513 (C. A. 3), reversed, 316 U. S. 31, pointed out that under the philosophy of the Act the effectiveness of the strike as a weapon which Congress desired to sanction "depends upon inconvenience to the employer," and therefore the Act affirmatively implies that "timing can be selected in terms of strategy rather than in terms of effective production." Could a state take a contrary view and

enjoin strikes not preceded by a state-imposed cooling-off period, or by notice to the employer? State requirements such as these, dealing with the "method" by which work stoppages can occur, would clearly stand as an obstacle to the effectuation of federal policy.

The Wisconsin statute invoked in this case,^{*} both on its face and as construed by the Wisconsin Board and courts, is in conflict with Section 7 of the National Act. As construed by the Supreme Court of Wisconsin in this case (R. 111-113), Section 111.06 (2) (h) of the Wisconsin Act, outlaws all work stoppages which do not fall within the category of strikes as therein defined. It is clear that the definition of strike adopted by the Supreme Court of Wisconsin, and by the Wisconsin Board, is far narrower than the area of concerted activities held protected under Section 7 of the National Act by the National Board and the federal courts (see cases discussed, pp. 22-25, *supra*).

In this case there is no question but that Wisconsin's regulation of the activities here involved

^{*} The Wisconsin Employment Peace Act provides in part as follows:

"It shall be an unfair labor practice for an employee individually or in concert with others: * * * (h) To take unauthorized possession of property of the employer or to engage in any concerted effort to interfere with production except by leaving the premises in an orderly manner for the purpose of going on strike." Wis. Stat. (1947) c. 111, § 111.06 (2).

is predicated upon local labor relations policy and hence operates in the same field as does the National Act. Nor do we believe that excessive difficulty will be encountered in determining whether any state regulations affecting work stoppages are predicated upon labor relations policy and are hence superseded by the federal policy. The test, we believe, is whether the state makes stoppage of work by employees, as such, or any incidental effect of such action, as such (*e. g.*, interruption of production, disobedience of an employer's orders to continue work, "coercion" of an employer to yield to demands, etc.) an ingredient of an offense under state law. Compare *Pollock v. Williams*, 322 U. S. 4, 17. If so, the state regulation clearly operates in the field of labor relations, and is therefore barred.

II

CLEAR EVIDENCE OF CONGRESSIONAL INTENTION, AS WELL AS CONSIDERATION OF THE SEVERE IMPACT UPON ADMINISTRATION OF THE NATIONAL ACT WHICH WOULD RESULT FROM APPLICATION OF LOCAL LABOR RELATIONS POLICIES TO INTERSTATE INDUSTRIES, REQUIRES THE CONCLUSION THAT CONGRESS PREEMPTED THE FIELD OF LABOR RELATIONS AFFECTING INTERSTATE COMMERCE.

We are aware that the conclusion that Congress has ousted the states from exercising regulatory control of a particular subject matter does not

follow automatically from showing that Congress has legislated concerning it. The real question is as to the intention of Congress. If the intention of Congress is clear, that, of course, is controlling. Where Congress has not manifested its intention in this regard, this Court examines the impact of state regulation upon the scheme established by Congress to determine whether both can "consistently stand together," *Sinnot v. Davenport*, 22 How. 227, 243, or whether state regulation would stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U. S. 767, 773, quoting *Hill v. Florida*, 325 U. S. 538, 542; *Cloverleaf Butter Co. v. Patterson*, 315 U. S. 148; *Hines v. Davidowitz*, 312 U. S. 52, 67.

In the *Bethlehem* case this Court found upon consideration both of the legislative history of the Wagner Act, and of the consequences of state regulation, that Congress left no room for the exertion of state authority in the area covered by the National Act. The relevant legislative history then consisted largely of the fact that Congress had specifically left certain portions of the general field to state control, and that, in contrast with other contemporary legislation, it had incorporated no clause declaring that state

laws bearing on the same subject matter shall not be abrogated. See statutes cited in the *Bethlehem* case, 330 U. S. 767, 771-772. The conclusion that Congress meant to preclude state regulation of the subject dealt with in the Act therefore rested largely on inference.

The terms and the legislative history of the amended Act, however, place the issue beyond doubt. Congress squarely faced the question of the relationship between national and state labor-relations policies in industries affecting interstate commerce and concluded that, except in specific instances, like the making and enforcement of closed-shop contracts, federal policy was to prevail. It further provided, in explicit terms, that the states could exercise jurisdiction in this field only upon cession from the National Board. And this approach was the result of Congress' deliberate decision to preempt for federal power the field covered by the National Act (*supra*, pp. 14-15).

It cannot be suggested, we submit, particularly in the light of Section 8 (b) (1) and (3) of the Act, and of the proposals to limit further the scope of protection for concerted activities which Congress considered and rejected as a matter of policy, that any phase of regulation of work stoppages as a matter of labor-relations policy is outside of the field covered by Congress in the Act. The comprehensive definition of strikes in Section 501 (2), itself shows that Congress covered that en-

tire field. Certainly, as we have shown, the National Board is empowered to consider, both in determining whether work stoppages are protected by Section 7, and in determining whether they are outlawed by Section 8 (b), the legitimacy of the methods as well as the objectives of work stoppages. It cannot, therefore, be said that what Wisconsin has purported to regulate is a "phase" of the subject "left unregulated by the nation." *Cloverleaf Butter Co. v. Patterson*, 315 U. S. at p. 155; *New York Central R. Co. v. Winfield*, 244 U. S. 147, 150. If Congress left unenjoinable the activities which Wisconsin has here enjoined, it did so either because it believed such activities desirable (assuming that the National Board should find them protected by Section 7), or because it believed the disciplinary power of employers adequate to cope with them. In neither case did Congress refer decision on the matter to the varying views of the states.

In any event, intrusion in this area would so severely hamper uniform administration of the federal act by the National Board that only the clearest expression of Congressional intent to permit state action would warrant such a result. The difficulties raised by state intrusion, which in the *Bethlehem* and *LaCrosse* cases warranted the conclusion that state power was superseded, are even graver here. These difficulties alone require giving the fullest effect to the intention of Congress to preclude the exercise by the states

of concurrent jurisdiction in the field of labor relations affecting interstate commerce.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the opinion and judgment of the Court in the instant case should be set aside, and that the petition for rehearing filed herein should be granted. If this Court should decide to order reargument, the Board respectfully prays leave to participate therein.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1948

Nos. 14 and 15

INTERNATIONAL UNION, U.A.W.A., A.F. of L. LOCAL 232;
ANTHONY DORIA, CLIFFORD MATCHEY, WALTER
BERGER, ERWIN FLEISCHER, JOHN M. CORBETT,
OLIVER DOSTALER, CLARENCE EHRLMAN, HERBERT
JACOBSEN,

Petitioners,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E.
GOODING, HENRY RULE and J. E. FITZGERALD, as
Members of the Wisconsin Employment Relations Board; and
BRIGGS & STRATTON CORPORATION, a Corporation,

Respondents.

BRIEF OF BRIGGS & STRATTON CORPORATION IN REPLY TO AMICUS BRIEF FOR NATIONAL LABOR RELATIONS BOARD

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**BRIEF OF BRIGGS & STRATTON CORPORATION
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NATIONAL LABOR RELATIONS BOARD**

**The Board's Argument Proceeds on an Erroneous
Assumption and Has Been Correctly Decided
Against It.**

We hesitate to burden the Court with still another brief, but feel it necessary to make a very short reply to the brief filed for the National Labor Relations Board so that failure to do so may not leave any implication that the brief is not answerable. On the contrary, its argument has been fully met and answered by this Court in its decision herein, due to the fact that the whole thesis of the Board's present brief constituted one of the princi-

pal arguments of the petitioners, which they covered at great length in their original brief. The Board has merely and at great length repeated, in varying language, the points so exhaustively covered and argued before this Court in the voluminous briefs heretofore filed and in the lengthy oral argument.

Every case of any consequence cited in the Board's brief (and many more not there cited) were brought to the attention of this Court in one or the other of the twelve briefs originally filed herein. Furthermore, since those briefs were filed, this Court has decided at least four other cases applying the principles of the decision in this case,—the three "Closed Shop" cases and the *Algoma Plywood* case.

The Board is unnecessarily exercised over what it conceives to be the extent of the holding in this case,—even carrying its argument to the untenable extreme of indicating (pp. 53-5) that States could, under this decision, prohibit all strikes, whereas no fair reading of the decision leads to any such conclusion.

The Board, in substance, says *it believes* that Congress intended to commit to the Board, to the absolute exclusion of any state regulation whatever, every conceivable phase of labor relations affecting commerce, including all employer, union and employee conduct connected in any way with "labor relations," short of actual violence, fraud and "similar conduct".

Since the Board starts with that premise which this Court in a series of cases, including the decision herein, has demonstrated to be erroneous, the bulk of the Board's argument falls. Although the Board's argument is broken up into a number of headings and subheadings, each sec-

tion is a reiteration in different language of what the Board believes was the intent of Congress. That "belief" which it attempts largely to spell out of legislative history and debate (from which a contrary conclusion has been reached by this Court from the same source material), necessarily must give way in the face of (1) the actual language of the Act itself, and (2) the judicial construction of the Act repeatedly given to it by this Court and lower Federal Courts in applying basic principles for ascertaining Congressional intent in connection with legislation impinging on state's activities.

The brief, furthermore, is not only inconsistent with one of the principal conclusions of the petitioners, but is inconsistent within itself. The petitioners asserted vigorously and in purported reliance on legislative history that the activity in question is positively protected by the Federal Act. The brief of the Congress of Industrial Organizations filed *amicus curiae* herein asserts with equal confidence from similar sources that the tactics would be an unfair labor practice not protected under the Federal Act. Finally, the Board now argues that it might or might not be an unfair practice, and that "The question is an open one" (Br. p. 29), whereas at several other points in the brief the Board indicates that it has already prejudged the situation and that the activities are protected under the Act (Br. pp. 45, 46, 57, 58).

The striking feature of the Board's brief is its complete failure to recognize what this Court clearly envisioned; namely the underlying implications of these tactics, and that if they are uncontrolled by state regulation (since they are not specifically regulated by Federal legislation), the logical result is Union control of the hours and conditions of employment.

The Board falls into the same inconsistent position as the petitioners in arguing at one point that Congress left the control of these activities to retaliation or discharge by the employer, while arguing at a later place that the only way the matter could get to the Board would be by the employer, at his peril, inflicting discharge or discipline and then running his chances of being told later by the Board whether or not he acted within his rights.

The temptation is strong to point out in more detail, section by section, the specific fallacies and occasional inconsistencies of the Board's brief, but we feel that at this late stage of the case it would be little short of an imposition on the time and patience of the Court, if not a reflection on its understanding of the issues which were before it, for us to make such an argument, particularly having in mind that our last brief (pp. 11-21) and that of the Wisconsin Attorney General filed in Response to the Petition for Rehearing have covered the point, but primarily because this Court's own decision is the best possible refutation to the argument again repeated by the Board.

While it has no particular bearing on the outcome of the case, we do call attention to the fact that footnote 6 at page 47 is not only inaccurate but leaves a wholly erroneous impression, which we believe the Solicitor General and the other attorneys whose names appear on the brief could not have intended, and which may have been due to inaccurate information furnished them. The footnote says the Union has filed charges alleging that the Company violated the Act "by imposing disciplinary penalties upon employees for engaging in a series of work stoppages similar to those considered by the Court in this case". Actually, the formal charge filed by the Union and of record, at least in the Chicago Regional Office of

the Board, asserts that the Company has engaged in unfair labor practices in that, among other things, it "has discriminated in regard to terms or conditions of employment in threatening to withdraw holiday compensation and threatening to shut down its plants because of the exercise of rights guaranteed to the employees under the Act". An affidavit of a representative of the Union filed with the Board in support of the charge simply states "That as a result of the unfair labor practices on the part of the employer, the Union engaged in a strike on April 28, 1948; that following the return of the employees to work, the company publicly announced that as a result of such strike the members of the Union would forfeit pay which they would otherwise receive for the Memorial Day holiday; that an official of the company has stated that should the employees again strike, they will be shut out of the plant in retaliation for such strike". There is no reference whatever to any "series of work stoppages" and, of course, the charges are merely unproven *claims* of the Union.

The next sentence of the footnote to the effect that "These stoppages occurred after the Circuit Court of Milwaukee County set aside the order of the Wisconsin Board" is stated as a fact and also leaves an erroneous impression inasmuch as April 28, 1948, the only date referred to by the Union in its charges or affidavit, was months after the order of the Wisconsin Board had been *reinstated* by the decision of the Wisconsin Supreme Court.

The last sentence is also completely inaccurate in that the Board is, in fact, actively investigating the charges, as evidenced by a telephone call for data received by this Respondent's counsel from a Field Representative of the Chicago Office of the Board as late as April 11, 1949.

It is not amiss to note in conclusion that this decision was announced nearly two months ago; that Congress is presently in session and considering revision of the Federal labor laws; that in view of the several conflicting opinions among the Petitioners here, the C. I. O. Union, the National Board, the Respondents and this Court as to what the Congressional intent was, the present Congress is in a position to clarify at least what its intent is, if there is any genuine doubt about it or if it does not accord with the present intent of the present Congress.

For the reasons set out in this and the other briefs which we and the Attorney General of Wisconsin have recently filed, and for the reasons contained in the decision of the Court in this case, it is respectfully submitted that the petition for rehearing should be denied.

Respectfully submitted,

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In the
**Supreme Court
of the United States**

October Term, 1948

Nos. 14 and 15

INTERNATIONAL UNION, UNITED AUTOMOBILE
WORKERS OF AMERICA, A. F. OF L., LOCAL
232; ANTHONY DORIA, CLIFFORD MATCHEY,
WALTER BERGER, ERWIN FLEISCHER, JOHN
M. CORBETT, OLIVER DOSTALER, CLARENCE
EHRMANN, HERBERT JACOBSEN, LOUIS
LASS,

Petitioners,

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD,
L. E. GOODING, HENRY RULE and J. E. FITZ-
GIBBON, as Members of the Wisconsin Employ-
ment Relations Board; and BRIGGS & STRATTON
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**BRIEF OF WISCONSIN EMPLOYMENT RELATIONS
BOARD IN REPLY TO BRIEF OF NATIONAL
LABOR RELATIONS BOARD AS AMICUS CURIAE**

THOMAS E. FAIRCHILD
Attorney General

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*Attorneys for Wisconsin
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Although the above entitled matter was decided Feb-
ruary 28 and the extended period for filing petition for
rehearing expired on March 30th, the brief of the National
Labor Relations Board, amicus curiae, was not served upon
the respondents until April 14; and so this respondent's
brief in opposition to the petition for rehearing, which was
filed on April 7, could contain no comment on the conten-

tions of amicus curiae. This respondent does not object to consideration of the brief amicus on the ground of delayed filing, but asks permission of the court to reply only to the extent necessary to comment upon the significance—or lack of significance—of the arguments at this stage of the proceeding.

Most of the 62-page brief of the National Board is a detailed repetition of matters finally submitted to the court on November 17 and 18 after the filing of exhaustive briefs, and we will not endeavor to reargue those matters.

The entire brief of amicus curiae is based upon the premise that Congress did *not* intend what this court determined that it *did* intend. We believe that this court gauged the Congressional intent correctly; but even if it had not, Congress could readily have corrected any misinterpretation of its intent since February 28, when the decision was published. Its failure to take such action must reflect its satisfaction with the court's analysis.

The argument of amicus curiae is based upon the premise that the text of the law itself is ambiguous so that resort to extraneous considerations must be had in aid of construction. For that purpose amicus curiae has discussed legislative history, committee reports, and even legislative arguments, the consideration of which is permissible only if Congress failed to make its intent clear in the law itself. If extraneous considerations are permissible on that ground, surely the most persuasive of extraneous circumstances is the apparent satisfaction of Congress with the court's decision as evidenced by its failure to reject it legislatively.

If the decision does not accord fully with the intent and the wishes of Congress, the simplest and surest way

of clarifying the question would be by amendment, instead of throwing back into uncertainty for prolonged additional consideration, issues which have been resolved for a sufficient length of time that persons most affected have incorporated them into their programs.

It has been suggested that the decision here involved might interfere with the right of the National Board to determine whether an unfair practice existed under sec. 8 (b) 1 of the Labor Management Relations Act, 1947, relating to coercion of employees. That element is not involved in the decision because the challenged portion of the state board's order had nothing to do with coercion of employees.*

The suggestion is also made that the decision might interfere with the National Board's power under sec. 8 (b) 3 of the National Act to enjoin refusals of a union to bargain. This is based on the passing comment by the court that the employer was not informed of any specific demands which the coercive tactics were designed to enforce. Such statement by the court (which, incidentally, has been challenged by the petitioners) was one incident only in the description of a total plan, and nowhere in the court's decision was there an indication that the decision was premised on that circumstance as the deciding factor. In any event, there could be nothing inconsistent between the state's prohibition against the larger program of tortious conduct, of which the failure to make specific

*Such a question was before the state board, and an order was issued prohibiting intimidation of employees to join in a coercive program against their will; but that provision was not attacked, whether because the petitioner believed it moot because it was issued before the Labor Management Relations Act, 1947, was enacted, or for some other reason is not shown.

demands was a mere incident, and either a requirement that the union bargain or a finding that it had not failed to do so based on the latter element.

It was suggested at page 51 of the brief *amicus curiae* that the problem here involved differs from the tortious conduct under consideration in the *Sands* case*, where the court decided that concerted action in repudiation of a contract is beyond the protection accorded by federal legislation. The instant case is exactly that, one in which the coercive conduct consisted of inducing employees to repudiate their contract obligations without relinquishing the benefits of the contracts.

To carry to its logical conclusion the argument that *any* conduct, which might be involved in the National Board's consideration of whether an unfair practice has been committed, is immune from police regulation would make impossible, for instance, state regulation against mass picketing in a manner to obstruct entrances to public buildings, because such picketing might be found under sec. 8 (b) 1 of the national act to constitute the unfair practice of coercing employees. We do not believe that Congress intended to prevent states from taking protective action against tortious conduct, which has not itself been defined as an unfair practice, merely because such tortious conduct might be considered as an element in connection with charges of unfair practice on a different ground.

Amicus curiae also challenges the decision of this court on the ground that the court had no power to determine what the law meant without the National Board first hav-

*National Labor Relations Bd. v. *Sands Mfg. Co.* (1939) 306 U. S. 332, 83 L. ed. 682, 59 S. Ct. 508.

ing made its determination.* We believe it to be settled that the proper interpretation of law is a legal question; and that legal questions may be determined by the judiciary whenever that is necessary to a determination of the rights of parties in a real controversy coming before it. To say that courts might not determine legal questions in such cases would be not only an innovation, but an infringement upon the judicial power. We do not believe that Congress intended to try to deprive this court of its power to determine legal questions, when necessary to the proper disposition of a case before it, and to transfer such inherently judicial power to an administrative agency.

In dozens of cases before this court and circuit courts of appeals (many of which were considered in arriving at the decision issued in this case on February 28) the court's decision that certain types of concerted activities are beyond the scope of federal legislation, and so beyond the power of the National Board to render immune, were made where the National Board had not only issued orders to the contrary but presented its contentions vigorously as a party litigant in support of the orders. If the courts may interpret the statute contrary to orders and contentions of the National Board, surely it may define a rule of law where the board has made no contrary order. To do so does not "atrophy" the jurisdiction of the National Board, because all administrative agencies are necessarily limited by the scope of the statute as interpreted judicially. When the highest tribunal in the land has stated as a rule of law what the statute means, all administrative agencies are to

*See page 36 of the brief amicus curiae where it is stated that the court's decision results in "transferring" the function from the National Board to this court.

be guided by that rule. This is not a usurpation of administrative jurisdiction, but the exercise of a function traditionally judicial.

Amicus curiae argues that all concerted activity of the type involved in the *Fansteel** and *Sands** cases is now made immune from state police power by the Labor Management Relations Act, 1947, no matter how tortious, and no matter what its impact on the local welfare. (See pages 51-52 of brief amicus curiae.) It is urged that the only remedial action allowed by Congress with respect to tortious concerted activity must be initiated by employer discipline. It is also urged that any other policy would result in 48 sets of rules. For the purpose of this brief, we will assume that 48 sets of rules would indeed be bad policy, although we cannot see how that fact would be decisive of the case if Congress chose to permit it. However, we do not think that is a proper evaluation of the result of the rule announced in this court's decision.

In the first place, having employer discipline as a necessary first step involves a far greater potential variation than 48 sets of rules. There are thousands, or perhaps millions, of employers in the country, each of whom establishes his own disciplinary policy. The cases in which he determines not to discipline would not reach the National Board at all, but would be settled wholly according to the policies of the employer. If he determined to discipline, the case might or might not reach the National Board according to the resources and pertinacity of the employees

**National Labor Relations Board v. Fansteel M. Corp.* (1939) 306 U. S. 240, 83 L. ed. 627, 59 S. Ct. 490.
National Labor Relations Bd. v. Sands Mfg. Co. (1939) 306 U. S. 332, 83 L. ed. 682, 59 S. Ct. 508.

affected. The number of potential variations in the rules affecting concerted conduct of employees would be unlimited if the standard established by the court were again removed.

If the decision remains in effect, it is a standard to be followed throughout the country, not only by states but by all other institutions and individuals.

So far as can be ascertained from the long and fairly successful history of our dual form of government, there have been very few, if any, cases in which there were 48 separate sets of rules for any situation. State courts follow precedent so that, on most subjects, rules of all the states tend to become uniform. Even where there is a variance, it is unusual that it cannot be divided into no more than two sets of rules: that is, one representing the majority and one representing the minority. When as definite a standard as has been laid down for the government of the states as has been done by this court, some small degree of variance and experimentation to meet variances in local need is surely not evil. When any renegade state tends to abuse the scope of the variance permitted, it may be forced into line. Employees are no more powerless against infringement of their rights by states (as suggested at page 37 of the brief *amicus curiae*) than they would be against any type of infringement. That is illustrated in the instant case.

The contention that Congress intended that the elimination of improper conduct must be left wholly to the employer's discipline and that for states to concern themselves is somehow reprehensible causes us some concern because of the implication that states are less worthy to be trusted with matters affecting the welfare of employees

than are employers. It is the states on whose behalf the Congress and the national administrative agencies act. Surely the principals whom the Congress and the federal agencies represent should not be discredited for motives less worthy than those of their employer subjects. We cannot believe that Congress so mistrusted the motives of state governments as to prefer to transfer their traditional police powers to a single group of subjects and so wholly to substitute vindictive partisan action for action on behalf of the public.

The great majority of states endeavor conscientiously to follow national principles and to respect the rights of their citizens; and in the few cases where they do not, the federal courts are capable of protecting the citizens.

We believe the court adopted a workable standard which has established a stable source of guidance since publication of its decision on February 28. That standard is known to Congress so that, if for any reason it were deemed undesirable, the standard could be repudiated simply and quickly, without throwing the whole question again into prolonged uncertainty.

Respectfully submitted,

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